144

(i)

Supreme Court, U.S.
FILED
09-524 OCT 16 2009
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NITRO DISTRIBUTING, INC., *et al.*,
*Petitioners,*

v.

ALTICOR, INC., *et al.*,
*Respondents.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

# PETITION FOR A WRIT OF CERTIORARI REDACTED PURSUANT TO PROTECTIVE ORDER

R. Dan Boulware*
Sharon Kennedy
POLSINELLI SHUGHART PC
3101 Frederick Avenue
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117
*Counsel of Record* *Attorneys for Petitioners*

## QUESTIONS PRESENTED

1. Whether in order to avoid summary judgment an antitrust plaintiff having direct evidence that a defendant committed a *per se* antitrust violation by participating in a horizontal conspiracy to allocate customers and fix prices must also separately satisfy the *Matsushita* standard by presenting evidence tending to exclude the defendant's proffered claim that it was acting independently, a question as to which the courts of appeals are in conflict.

2. Whether a defendant that participated in a *per se* horizontal antitrust conspiracy may nevertheless obtain summary judgment on the ground that its market share was *de minimis* when compared to that of its competitors.

## LIST OF PARTIES

The Petitioners are:

Nitro Distributing, Inc.
West Palm Convention Services, Inc.
Netco, Inc.
Schmitz & Associates, Inc.
U-Can-II, Inc.

Respondents are:

Alticor, Inc.
Amway Corporation
Quixtar, Inc.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners Nitro Distributing, Inc.; West Palm Convention Services, Inc.; Netco, Inc.; Schmitz & Associates, Inc. and U-Can-II, Inc. have no parent companies and no publicly held company owns 10% or more of their respective stock.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 5

REASONS FOR GRANTING THE WRIT ..... 11

I. REVIEW IS NECESSARY TO RESOLVE A DIRECT CONFLICT BETWEEN THE CIRCUITS ON WHETHER AN ANTITRUST PLAINTIFF PRESENTING DIRECT EVIDENCE THAT THE DEFENDANT PARTICIPATED IN AN ANTITRUST CONSPIRACY MUST SEPARATELY SATISFY THE *MATSUSHITA* STANDARD ..... 11

II. REVIEW IS NECESSARY BECAUSE THE EIGHTH CIRCUIT'S CREATION OF A *DE MINIMIS* COMPETITION EXEMPTION FROM LIABILITY AS A HORIZONTAL COMPETITOR CONFLICTS WITH THE COURT'S PRECEDENT THAT A SHOWING OF MARKET POWER IS NOT REQUIRED IN *PER SE* CLAIMS ..... 19

CONCLUSION ..... 22

APPENDIX

05/04/2009 Opinion, 8th Circuit Court of Appeals, *Nitro Distributing, Inc. v. Alticor, Inc.*, 565 F.3d 417 (8th Cir. 2009) ..... App. 1

02/28/2008 Order granting summary judgment to defendants, *Nitro Distributing, Inc. v. Alticor, Inc.*, Case No. 03-3290-CV-S-RED (W.D. Mo.) (unpublished) ..... App. 27

01/04/2008 Order granting summary judgment on antitrust claims of Netco, Inc. and Schmitz & Associates, *Nitro Distributing, Inc. v. Alticor, Inc.*, Case No. 03-3290-CV-S-RED (W.D. Mo.) (unpublished) ..... App. 59

07/11/2006 Opinion, 8th Circuit Court of Appeals, *Nitro Distributing, Inc. v. Alticor, Inc.*, 453 F.3d 995 (8th Cir. 2006) ..... App. 68

09/16/2005 Order denying Defendants' Motion to Dismiss, or in the Alternative to Stay the Case and Compel Arbitration, *Nitro Distributing, Inc. v. Alticor, Inc.*, Case No. 03-3290-CV-S-RED (W.D. Mo.) (unpublished) ..... App. 76

07/15/2009 Order denying petition for rehearing en banc and petition for rehearing by the panel ..... App. 110

15 U.S.C. § 1 ..... App. 111

15 U.S.C. § 2 ..... App. 111

15 U.S.C. § 15 ..... App. 112

U.S. Const. amend. V ..... App. 115

APPENDIX VOLUME II UNDER SEAL (submitted separately under seal)

## TABLE OF AUTHORITIES

CASES

*Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249 (10th Cir. 2006) ..... 12

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 21

*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) ..... 16

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ..... 13-14

*Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006) ..... 13

*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) ..... 6, 20

*Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11 (1st Cir. 2004) ..... 12-13

*Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) ..... 19-20

*Geneva Pharmaceuticals Tech. Corp.*, 386 F.3d 485 (2d Cir. 2004) ..... 19

*In re Nine West Shoes Antitrust Litigation*, 80 F. Supp.2d 181 (S.D.N.Y. 2000) ..... 19

*Knevelbaard Dairies v. Kraft Foods, Inc.*,
232 F.3d 979 (9th Cir. 2000) ..... 19

*Lovett v. General Motors Corp.*,
998 F.2d 575 (8th Cir. 1992) ..... 12

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
475 U.S. 574 (1986) ..... 9, 17

*Monsanto Co. v. Spray-Rite Serv. Corp.*,
465 U.S. 752 (1984) ..... 17

*National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,
468 U.S. 85 (1984) ..... 19

*Nitro Distributing, Inc. v. Alticor Inc.*,
453 F.3d 995 (8th Cir. 2006) ..... 9

*Northern Pac. Ry Co. v. United States*,
356 U.S. 1 (1958) ..... 17, 19

*Rossi v. Standard Roofing, Inc.*,
156 F.3d 452 (3d Cir. 1998) ..... 11, 15

*Service & Training, Inc. v. Data General Corp.*,
963 F.2d 680 (4th Cir. 1992) ..... 12

*Toscano v. Professional Golfer's Ass'n*,
258 F.3d 978 (9th Cir. 2001) ..... 12

*Toys "R" Us, Inc. v. Federal Trade Comm'n*,
221 F.3d 928 (7th Cir. 2000) ..... 12

*United States v. Container Corp. of America*,
393 U.S. 333 (1969) ..... 6

*United States v. Cooperative Theaters of Ohio, Inc.*,
845 F.2d 1367 (6th Cir. 1988) ..... 6

*Viazis v. American Ass'n of Orthodontists*,
314 F.3d 758 (5th Cir. 2002) ..... 12

*Virgin Atl. Airways Ltd v. British Airways PLC*,
257 F.3d 256 (2d Cir. 2001) ..... 13

*Williamson Oil Co., Inc. v. Philip Morris USA*,
346 F.3d 1287 (11th Cir. 2003) ..... 12

STATUTES

15 U.S.C. § 1 ..... 1, 2

15 U.S.C. § 2 ..... 1, 3

15 U.S.C. § 15 ..... 1, 3, 16

18 U.S.C. § 1961 ..... 1

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1331 ..... 1

28 U.S.C. § 1332 ..... 1

OTHER AUTHORITIES

U.S. Const. amend. V ..... 5, 15, 20

## OPINIONS BELOW

This petition for review arises from summary judgment orders entered by the United States District Court for the Western District of Missouri on January 4, 2008, and February 8, 2008, in the case styled *Nitro Distributing, Inc., et al. v. Alticor, Inc., et al.*, Case No. 03-3290-CV-S-RED. Copies of the unreported judgments are found at App. 59 and 27, respectively. The Eighth Circuit Court of Appeals affirmed the district court's judgments in an opinion dated May 4, 2009, reported at 565 F.3d 417 (8th Cir. 2009). *See* App. 1.

## STATEMENT OF JURISDICTION

The district court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331, based on federal questions under 15 U.S.C. §§ 1, 2 and 15, and 18 U.S.C. § 1961, *et seq.* In addition, jurisdiction was invoked under 28 U.S.C. § 1332 because of diversity of citizenship. Plaintiffs Nitro Distributing, Inc.; Netco, Inc.; and Schmitz & Associates, Inc. are/were Missouri corporations; and Plaintiffs West Palm Convention Services, Inc. and U-Can-II, Inc. are Florida corporations. Respondent Alticor Inc. was a Michigan corporation; Amway Corporation was a Delaware corporation; and Quixtar Inc. was a Virginia corporation.

The Eighth Circuit affirmed the district court's judgments on May 4, 2009, and denied a timely filed petition for rehearing on July 15, 2009. (App. 110) This petition for a writ of certiorari was timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Title 15 United States Code, Section 1**

Sec. 1. Trusts, etc., in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(App. 111)

**Title 15 United States Code, Section 2**

Sec. 2. Monopolizing trade a felony; penalty

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(App. 111)

**Title 15 United States Code, Section 15**

Sec. 15. Suits by persons injured

> (a) Amount of recovery; prejudgment interest
>
> Except as provided in subsection (b) of this

> section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances....

(App. 112)

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

(App. 115)

## STATEMENT OF THE CASE

Non-party horizontal competitors InterNET Services, Inc. and Pro Net Global Association, Inc. admittedly made an agreement not to solicit each other's customers in exchange for payments [redacted] a *per se* illegal

"customer-allocation" agreement.[1] A Pro Net officer also admitted exchanging pricing information with horizontal competitor InterNet, another *per se* violation of § 1 of the Sherman Act.[2] These facts, presenting direct evidence of an antitrust conspiracy between InterNET and Pro Net and its founders, were not in dispute. Rather, the central issue in this case was whether the Respondents here, Amway Corporation and its affiliated entities (collectively "Amway"), joined a conspiracy with Pro Net and its founders, of which those antitrust violations and other wrongful conduct were a part. Petitioners presented direct evidence that Amway actively participated in the conspiracy, including the testimony of two of its alleged co-conspirators that [redacted][3]

The five Petitioners, Pro Net's founders, Pro Net and InterNET each produced and sold motivational material, and/or presented seminars, primarily targeted to Amway distributors, referred to as "business support materials" or "BSMs." Amway also sells BSMs, although to a lesser extent than Pro Net and InterNET. Accordingly, Petitioners, Amway, Pro Net, its founders, and InterNET are each

---

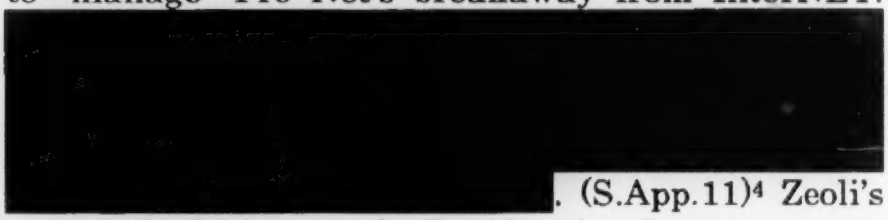
[1] See *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("horizontal price fixing and market allocation" are per se illegal).

[2] *See United States v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969).

[3] The evidence in this case was largely undisputed as Amway elected not to controvert any of the facts Petitioners presented in opposition to Amway's summary judgment motion.

horizontal competitors of each other in the BSMs market.

In 1997, Pro Net's founders decided to "break away" from InterNET, their primary supplier of BSMs, in order to produce and sell their own BSMs through their newly formed corporation, Pro Net, and its agent, Global Support Services, Inc. ("Global"). Because the owner of InterNet, and each of the founders of Pro Net also owned separate corporations that were major distributors in the Amway product business, Amway feared that a disharmonious split between Pro Net and InterNET could negatively affect Amway's products business. At the same time, Amway also recognized that the breakaway presented Amway with an opportunity to increase its own sales of BSMs by selling them through Pro Net (which it eventually did).

Amway therefore formed a steering committee to "manage" Pro Net's breakaway from InterNET.  . (S.App.11)[4] Zeoli's proposed solution was for Pro Net to make payments to InterNET in exchange for InterNET's agreement not to "raid" Pro Net's customers. (S.App.12) Following that proposal, several meetings were held to negotiate the terms of that agreement, attended by Kerkstra and Zeoli. Those negotiations culminated in an agreement whereby InterNET and Pro Net in fact agreed not to sell to or "raid" each other's customers in exchange for

[4] "S.App.xx" refers to Petitioners' "Appendix Volume II Under Seal."

payment by Pro Net to InterNET (the "customer-allocation agreement").[5]

Amway actively participated in negotiating the customer-allocation agreement. Pro Net agent Paul Brown testified . (S.App.11) And Pro Net Founder Tim Foley testified . (S.App.2) In addition, Pro Net Founder Gooch admitted that Pro Net and InterNET exchanged BSMs pricing information at meetings, which Amway's Kerkstra attended.

Petitioners filed suit against Amway,[6] alleging that it conspired with Pro Net and its Founders to violate the antitrust laws; tortiously interfered with Petitioners' contracts and business relationships; made

---

[5] *See, e.g.*, S.App.10 ; S.App.5 ; S.App.7 ; S.App.8 .

[6] Pro Net and its Founders were sued separately in state court actions that were the subject of confidential arbitration or settlement.

injurious falsehoods; and violated RICO. Petitioners' antitrust claims included price-fixing, allocation of customers, group boycotting and that Pro Net is itself an illegal association.

The Eighth Circuit, misstating the *Matsushita* burden,[7] affirmed the district court's grant of summary judgment to Amway on the grounds that Petitioners did not "exclude" the possibility that Amway was acting independently. (S.App.9) In so holding, the Eighth Circuit expressly acknowledged that two of its sister circuits – the Third and Eleventh – hold that the *Matsushita* standard does *not* apply when a plaintiff presents direct evidence of a conspiracy; rather, *Matsushita* applies only when a plaintiff is relying on circumstantial evidence. (S.App.10) Breaking ranks with its sister circuits, the Eighth Circuit ruled that even if an antitrust plaintiff presents direct evidence of a conspiracy, it still must exclude the possibility of independent action. (S.App.11) (The Eighth Circuit did not express an opinion as to whether or not Petitioners' evidence was direct.) Amway was acting "independently," the court below held, because its motives – to protect its own business interests[8] – were

---

[7] *Matsushita* requires an antitrust plaintiff to present evidence *tending* to exclude the possibility of independent action. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[8] Specifically, Amway justified its presence at the Pro Net-InterNET negotiations as being to ensure that Pro Net and InterNET complied with Amway's Rules of Conduct. The Eighth Circuit accepted that explanation even though in a prior appeal of this case it held that Amway's Rules of Conduct do not apply to BSMs distributors (such as Pro Net and InterNET). *See Nitro Distributing, Inc. v. Alticor Inc.*, 453 F.3d 995, 998 (8th Cir. 2006) (App. 72).

"lawful aims."[9] (S.App.11) The court's analysis did not address Petitioners' other claimed motive for Amway's conspiratorial conduct – that Amway wanted to increase its market for the sale of its own BSMs by selling them through Pro Net.

The Eighth Circuit alternatively ruled, *sua sponte*, that because Amway did not "meaningfully compete" with Pro Net and InterNET it was not a "horizontal" competitor, and therefore Petitioners' *per se* horizontal antitrust claims failed. (S.App.12-13)

Although neither the district court nor Amway disagreed that the customer-allocation agreement was unlawful, the Eighth Circuit held that summary judgment was also proper because Petitioners failed to show the illegality of the customer-allocation agreement and price-fixing or that Pro Net was an illegal association. (S.App.14-17) While Petitioners submit that the Eighth Circuit erred in so holding[10] and will urge reversal of that holding if review is

---

[9] This ruling, Petitioners submit, provides further evidence of the Eighth Circuit's confusion as to the application of *Matsushita*. "Independent" means "not in concert with." As discussed below, a defendant's subjective motives, however laudable, for joining a conspiracy do not excuse its collusive conduct that causes antitrust injury.

[10] In ruling that that the customer allocation agreement was a lawful agreement to pay a "royalty fee" for use of InterNET's tapes, the Eighth Circuit engaged in factfinding, disregarding Petitioners' contrary evidence, including [redacted] and a plethora of evidence that the purpose of the agreement was to prevent InterNET from raiding Pro Net's customers (as opposed to ensuring that InterNET was compensated for use of its tapes).

granted, Petitioners recognize that this error does not itself present a certworthy question.

## REASONS FOR GRANTING THE WRIT

### I. REVIEW IS NECESSARY TO RESOLVE A DIRECT CONFLICT BETWEEN THE CIRCUITS ON WHETHER AN ANTITRUST PLAINTIFF PRESENTING DIRECT EVIDENCE THAT THE DEFENDANT PARTICIPATED IN AN ANTITRUST CONSPIRACY MUST SEPARATELY SATISFY THE *MATSUSHITA* STANDARD

The Eighth Circuit's ruling in this case presents a square and irreconciliable conflict among the circuits, and imposes a heightened burden on antitrust plaintiffs to defeat summary judgment that has constitutional implications.

In holding that the *Matsushita* standard applies even if an antitrust plaintiff presents direct evidence of a conspiracy (App.11), the Eighth Circuit made a conscious decision to adopt a position that is polar opposite to the position of most of its sister circuits. Indeed, while the Eighth Circuit expressly acknowledged the contrary positions of Third and Eleventh Circuits, they are not the only circuits so holding. In fact, every other circuit that has addressed this issue, including a prior opinion of the Eighth Circuit, has either expressly held, or at least strongly suggested, that *Matsushita* applies only when a plaintiff must rely on circumstantial evidence to establish an antitrust conspiracy. *See, e. g., Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) ("[T]he *Matsushita* standard only applies when

the plaintiff has failed to put forth direct evidence of conspiracy. . . . [I]n direct evidence cases, the plaintiff need not adduce circumstantial evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."); *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 685 (4th Cir. 1992); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002) ("[A]n antitrust plaintiff who is unable to present direct evidence of a conspiracy must introduce circumstantial evidence that 'tends to exclude the possibility of independent action.'"); *Toys "R" Us, Inc. v. Federal Trade Comm'n*, 221 F.3d 928, 934 (7th Cir. 2000) ("When circumstantial evidence is used, there must be some evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently."); *Lovett v. General Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1992) ("Because there is no direct evidence of conspiracy in this case, we must decide whether a reasonable juror could infer the existence of a conspiracy from the circumstantial evidence."); *Toscano v. Professional Golfer's Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001) ("[T]he *Matsushita* analysis applies only when an inference of conspiracy must be made from circumstantial evidence."); *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1257 (10th Cir. 2006); *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003). The Eighth Circuit's opinion cannot be reconciled with any of these decisions.

Amway contends that the Eighth Circuit is not the lone dissenter on this issue, but rather joined the First and Second Circuits in holding that *Matsushita* applies regardless of whether the plaintiff presents direct evidence, citing *Euromodas, Inc. v. Zanella, Ltd.*,

368 F.3d 11, 17-18 (1st Cir. 2004) and *Virgin Atl. Airways Ltd v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001). Petitioners disagree with Amway's interpretation of those decisions. But even if they could be read as Amway claims, this would only enhance the existing split in the circuits on this issue – all the more reason why this Court should review this important federal question and bring uniformity to the circuits.

Confusion concerning an antitrust plaintiff's *Matsushita* burden arises with some frequency in the district courts as evidenced by the number of cases addressing this issue, including those listed above. *See also Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1085 (10th Cir. 2006) (declining to decide "the more difficult question" of whether, the plaintiff's "weak direct evidence suffices by itself to remove this case from the *Matsushita* framework."). Such confusion is certain to recur unless this conflict is resolved.

The Court has not yet squarely resolved the lower courts' differing interpretations of *Matsushita*. Aside from the plain language of *Matsushita* itself, the Court's only other guidance comes from its opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Although certiorari was granted in *Twombly* to consider the standard for initially *pleading* an antitrust conspiracy, both the majority and dissent also mentioned in passing an antitrust plaintiff's *summary judgment* burden. The *Twombly* majority's discussion of the *Matsushita* summary judgment burden unfortunately does not clearly address whether

*Matsushita* applies even when direct evidence is presented. The majority stated:

> An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action; and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.

*Id.* at 554 (citations omitted).

The first clause refers to a situation in which the plaintiff is relying solely on inferences drawn from circumstantial evidence to establish an antitrust conspiracy. *See id.* at 553 ("a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement'"). It is unclear whether that first clause qualifies the two clauses following it (which would suggest that the *Matsushita* standard applies only where the plaintiff is relying on circumstantial evidence) or whether the last two clauses are independent propositions (thereby suggesting that in all cases an antitrust plaintiff must satisfy *Matsushita*).

In their dissent, Justices Stevens and Ginsburg suggested that *Matsushita* applies only when there is no direct evidence of a conspiracy. The dissent first

stated that the Court has "developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act *when those claims rest on entirely circumstantial evidence of conspiracy.*" *Id.* at 585-86 (emphasis added). This statement was immediately followed by a discussion of *Matsushita* and the requirement that a plaintiff "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (internal quotations omitted)). Thus, the *Twombly* dissent seems to suggest that the *Matsushita* framework applies only when the plaintiff is relying entirely on circumstantial evidence.

The Eighth Circuit's interpretation of *Matsushita* as requiring something more than direct evidence of a defendant's participation in a conspiracy to survive summary judgment is illogical. If a plaintiff has direct evidence that the defendant participated in an antitrust conspiracy, then such evidence necessarily also satisfies *Matsushita*. After all, the *Matsushita* standard was created simply to ensure that the inferences drawn from circumstantial evidence of an antitrust conspiracy are reasonable, so that legitimate competition is not chilled. *See Rossi,* 156 F.3d at 466. Certainly, direct evidence of a defendant's conspiratorial conduct should satisfy an antitrust plaintiff's summary judgment burden. Any heightened burden at the summary judgment stage – such as that imposed by the Eighth Circuit below – has constitutional implications. If not corrected by the Court, it would lead to district courts becoming factfinders, weighing the controverted evidence, and depriving antitrust plaintiffs of their Constitutional due process right to a jury trial under the antitrust

laws, 15 U.S.C. § 15. *See Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 504 (1959) (recognizing right to a jury trial on treble-damages claims under the antitrust laws); U.S. CONST. amend. V (no person shall "be deprived of life, liberty, or property, without due process of law").

Indeed, the Eighth Circuit here imposed a constitutionally unsound heightened summary judgment burden on Petitioners, requiring them to *actually* "exclude" the possibility of independent action, as opposed to simply presenting some evidence "*tending*" to exclude the possibility that Amway was acting independently, which is all that *Matsushita* requires. (*See* App. 9 ("The record shows that appellants *failed to exclude* the possibility of independent action . . . ."); *see also* App. 11 ("it does not follow that the possibility of independent action need not be excluded when direct evidence is provided.")). In misstating and then misapplying the *Matsushita* standard, the Eighth Circuit imposed a burden that no plaintiff must meet to defeat summary judgment – to completely *disprove* the defendant's proffered defense, as opposed to simply creating a genuine issue of material fact as to that defense.

The Eighth Circuit's opinion adds still more confusion to the proper application of the *Matsushita* standard by holding that a defendant acts "independently" if it is motivated by a desire to protect its own business interest. (App. 12-13) It would be rare, indeed, to find an antitrust defendant who was not motivated by a desire to protect its own business interests. But that so-called "lawful" motive does not

give it license to violate the antitrust laws.[11] Instead, the true inquiry is whether the defendant acted "*collusively*" or "*in concert*" with its alleged conspirators. *See Matsushita,* 475 U.S. at 588 (distinguishing "independent action" from "collusive action"). This stems from the fact that a § 1 antitrust claim requires a showing of *concerted* action; a defendant's unilateral, or independent, action does not create antitrust liability. *See Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 761 (1984). For that reason, an antitrust plaintiff must present "direct or circumstantial evidence that reasonably tends to prove that the [alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 764.

In this case, there was ample direct (or at least strong circumstantial) evidence that Pro Net and InterNET consciously committed to achieve an "unlawful objective" – an agreement to allocate customers between Pro Net and InterNET – and that Amway shared a "unity of purpose" with Pro Net and InterNET to achieve their unlawful agreement. By way of direct evidence, Petitioners presented an audiotape on which Amway agent Zeoli is heard proposing the customer-allocation agreement to Pro Net as a means to avert a "war" with InterNET. And Amway's own alleged co-conspirators testified [redacted]

---

[11] In fact, in *per se* claims, as alleged here, courts should not consider a defendant's "business excuse" for its conduct because such conduct is "conclusively presumed to be unreasonable and illegal without elaborate inquiry as to . . . the business excuse for their use." *Northern Pac. Ry Co. v. United States,* 356 U.S. 1, 5 (1958).

[redacted]. That is not "independent" action; Amway did not act alone. Amway consciously acted with Pro Net and InterNET to bring the illegal customer-allocation agreement into fruition.

A defendant's concerted action to achieve an unlawful agreement should not be excused, as the Eighth Circuit did, by asserting that it was only motivated to act in order to protect its own business interest. The Eighth Circuit misconceived the meaning of "acting independently" as used in the *Matsushita* standard, creating confusion as to its proper application. If the Eighth Circuit's opinion is left uncorrected by this Court, at the very least antitrust plaintiffs in the Eighth Circuit will be subjected to a heightened burden to defeat summary judgment not imposed on similarly situated plaintiffs in any other circuit, thereby denying citizens in this circuit their constitutional right to have a jury weigh disputed evidence. With the *Nitro* opinion standing as precedent, future antitrust litigants will incur substantial expense debating the conflict in the circuits and confusion that the Eighth Circuit's opinion in this case has created, and both district and circuit courts will waste valuable judicial resources wrestling with those issues. It is therefore important for this Court to resolve the conflict among the circuits and bring clarity to the *Matsushita* standard now.

For these reasons, it is of national importance that the Court clarify the *Matsushita* summary judgment burden and bring uniformity to the circuits as to whether *Matsushita* applies only where a

plaintiff has failed to present direct evidence of a conspiracy.

## II. REVIEW IS NECESSARY BECAUSE THE EIGHTH CIRCUIT'S CREATION OF A *DE MINIMIS* COMPETITION EXEMPTION FROM LIABILITY AS A HORIZONTAL COMPETITOR CONFLICTS WITH THE COURT'S PRECEDENT THAT A SHOWING OF MARKET POWER IS NOT REQUIRED IN *PER SE* CLAIMS

The Eighth Circuit's separate ruling that an antitrust defendant may not be considered a horizontal competitor of its alleged co-conspirators if it has a *de minimis* market share (App. 13) is antithetical to the Court's prior rulings that *per se* claims are so pernicious that they are proscribed without the necessity of showing market power. *See, e.g., Northern Pac. Ry Co. v. United States,* 356 U.S. 1, 5 (1958); *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 109-10 (1984).[12] Indeed, the Court has said that even a small competitor may cause antitrust harm. *Federal*

---

[12] *See also Geneva Pharmaceuticals Tech. Corp.,* 386 F.3d 485, 509 (2d Cir. 2004) ("We have not required proof of market power in § 1 cases."); *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979 (9th Cir. 2000) ("When a per se violation such as horizontal price fixing has occurred, there is no need to define a relevant market or to show that the defendants had power within the market." (citing *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 434-35 (1990)); *In re Nine West Shoes Antitrust Litigation,* 80 F. Supp.2d 181, 188-89 (S.D.N.Y. 2000) ("Case law teaches that consumers are not required to prove market power in cases involving *per se* violations of the antitrust laws." (citations omitted)).

*Trade Comm'n v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 434-35 (1990). Petitioners' antitrust claims here include precisely the types of claims accorded *per se* illegal treatment – horizontal price-fixing and customer allocation. *See Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768 (1984) ("horizontal price fixing and market allocation" are per se illegal); *see also Northern Pac. Ry,* 356 U.S. at 5 (same). Review is necessary to bring the Eighth Circuit in line with well-established antitrust principles by overturning its creation of a *de minimis* competition exemption to co-conspirator liability.

In this case, the Eighth Circuit excused Amway from co-conspirator liability on Petitioners' *per se* antitrust claims stating:

> For appellants to succeed in their claims of *per se* antitrust violations, they must show that Amway was in direct competition with Pro Net and InterNET and that it was taking steps with its co-conspirators to restrain trade. . . . In an attempt to establish the existence of a horizontal relationship, appellants put significant weight on our earlier decision that recognized that Amway has its own tool business. *See Nitro Distrib., Inc. v. Alticor, Inc.,* 453 F.3d at 997. Amway's tool business, however, is limited to books written by Amway's creators, general marketing material, and free conventions for Amway distributors. *It is a small fraction of Amway's overall business and does not meaningfully*

> *compete with companies like InterNET and Pro Net*, and appellants' evidence does nothing to suggest otherwise. . . . Without this assumption, *Amway's motivations and actions are all vertical-between quasi-parent company and distributor, not horizontal competitors.* Vertical nonprice restraints are not *per se* illegal.

App. 12-13 (emphasis added) (citations omitted).

In other words, even though the Eighth Circuit previously recognized that BSMs distributors and Amway compete in the tools business"[13] -- and even though Amway itself admitted being a competitor in the BSMs market[14] -- the court nevertheless held that Amway was not a horizontal competitor in this case because its market share is *de minimis* as compared to Pro Net's and InterNET's.[15] This ruling – that market power matters as to whether a competitor is a horizontal competitor – sets an untenable precedent in

---

[13] App. 70.

[14] In Amway's "Antitrust Primer" authored by Amway's counsel, Amway stated: "Amway is not the supplier of BSM resold in independent "systems"; *it is a competitor, selling its own books, tapes and functions.*"

[15] In finding that Amway's market share was "*de minimis,*" the court below necessarily had to weigh conflicting evidence, a function not permitted in the procedural posture of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Indeed, Petitioners presented uncontroverted evidence that [redacted] By engaging in fact-finding, the Eighth Circuit deprived Petitioners of their Fifth Amendment constitutional right to a jury trial.

the Eighth Circuit. Petitioners are unaware of any other district court that has held in a *per se* illegal horizontal price-fixing or customer allocation claim that a competitor's market share somehow affects its liability. Again, such a ruling is irreconcilable with the authority cited above that a plaintiff alleging horizontal price-fixing and customer allocation need not show market power.

This Court's recognition in *Superior Court Trial Lawyers Ass'n* that even a small competitor may cause antitrust harm rings true here with respect to Amway's ability to control the BSMs market notwithstanding that its share of the market does not equal that of Pro Net or InterNET. Specifically, Amway has positioned itself as the gatekeeper of BSMs by enacting rules requiring Amway distributors to submit their privately produced BSMs to Amway for review and approval before they can be sold by the distributors' separate BSMs corporations. By withholding its consent, Amway can literally dictate who participates in the BSMs business and to what extent. Amway's supposedly "*de minimis*" market share does not prevent it from substantially affecting the BSMs market.

Review is necessary to bring uniformity to the circuits on this important antitrust issue.

## CONCLUSION

For these reasons, and particularly to bring the Eighth Circuit into conformity with every other circuit as to the antitrust and summary judgment principles established by the Court, Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

R. DAN BOULWARE
SHARON KENNEDY
POLSINELLI SHUGHART PC
3101 Frederick Avenue
St. Joseph, Missouri 64506
Telephone: (816) 364-2117
Facsimile: (816) 279-3977

Attorneys For Petitioners

565 F.3d 417

United States Court of Appeals,
Eighth Circuit.

**NITRO** DISTRIBUTING, INC.; West Palm Convention Services, Inc.; Netco, Inc.; Schmitz & Associates, Inc.; U-Can-II, Inc., Appellants,

v.

**ALTICOR**, INC., a foreign corporation; Amway Corporation, a foreign corporation; Quixtar, Inc., a foreign corporation, Appellees.

**No. 08-1451.**

Submitted: Jan. 14, 2009.
Filed: May 4, 2009.

R. Dan Boulware, argued, R. Todd Ehlert, Todd H. Bartels, Sharon Kennedy, on the brief, St. Joseph, MO, for appellant.

James Robert Sobieraj, argued, Chicago, IL, Thomas Walsh, St. Louis, MO, Cynthia A. Homan, Julie Leichtman, and Ralph J. Gabric, Chicago, IL, on the brief, for appellee.

Before LOKEN, Chief Judge, WOLLMAN and SHEPHERD, Circuit Judges.

WOLLMAN, Circuit Judge.

Nitro Distributing, Inc., West Palm Convention Services, Inc., Netco, Inc., Schmitz & Associates, Inc., and U-Can-II, Inc., (collectively, appellants), appeal

from the district court's[1] grant of summary judgment to Alticor, Inc., Amway Corporation, and Quixtar, Inc., (collectively, Amway); dismissal of appellants' Racketeer Influenced and Corrupt Organizations Act (RICO) claims; and various adverse discovery rulings. We affirm.

I.

Appellants were each distributors of Amway marketing materials. In an earlier decision involving these parties, we explained Amway's unique business model.

> Amway, a multinational company with sales in excess of $5 billion, sells a wide variety of products ranging from kitchen cleaner to jewelry to, in some countries, coffee and milk. . . . Amway distributes its products via a "network marketing" method. Under this method, a potential distributor must be sponsored into the company before he or she may sell Amway products. The sponsor, the sponsor's sponsor, and so on, are the "upline" for the new distributor. Amway encourages distributors to establish a "downline" by sponsoring other distributors, and it awards bonuses based on the volume of both the distributors' sales and the sales of their

[1] The Honorable Richard E. Dorr, United States District Judge for the Western District of Missouri.

> downline. Amway calls this system the "products business".
>
> Sponsors use motivational tools like tapes, lectures, and rallies, [or business support materials (BSMs)], to recruit new distributors and to encourage their downlines to sell as many products as possible. The "tools business" arose to meet the demand for motivational tools.

*Nitro Distrib., Inc. v. Alticor, Inc.*, 453 F.3d 995, 997 (8th Cir.2006). The tools business operates in largely the same manner as the products business in that there are lines of sponsorship and each distributor develops a downline. In both businesses, sponsors are not to solicit another sponsor's downline; a sponsor typically sells products to his own downline, and downlines generally buy their sponsor's products. Additionally many of the companies in the tools business are owned by individuals in the products business.

Until 1998, Dexter Yager headed the largest line of sponsorship in the tools business. Dexter Yager had long been one of Amway's largest distributors, and he also owns InterNET, the exclusive supplier of BSMs to all distributors in his downline. His son, Jeff Yager, is president of InterNET. In 1997, four members of Dexter Yager's downline – Hal Gooch, Bill Childers, Tim Foley, and Steve Woods (the founders) – decided they wanted to break away from InterNET and form their own BSM distribution system, which would become Pro Net. Ken Stewart, the owner of appellants

Nitro and West Palm, chose to join this breakaway and Pro Net Global Support Services (Global) became Pro Net's exclusive supplier of BSMs. Appellants were high-ranking downline distributors in the founders' and Dexter Yager's lines of sponsorship.

The founders contacted Amway to discuss their desire to separate from InterNET. Amway is accustomed to such separations and says that it often offers advice to assure a smooth transition and avoid disruption of its products business. Sharon Grider, Amway's in-house counsel, and Bob Kerkstra, Amway's Manager of Distributor Relations, expressed concern to the founders that the breakaway would be contentious. Grider agreed to provide assistance to the founders, which included model BSM contracts and the Amway Antitrust Primer. The primer warned that "[c]ompeting BSM sellers, including those involved in customer disputes, must not agree to divide up customers and revenue," but that "it may be appropriate to agree on how to separate BSM lines of sponsorship to resolve a dispute." The primer also recommended that the founders seek independent legal advice.

Unattributed handwritten notes suggest that an Amway Steering Committee was formed to "manage" the breakaway.[2] According to these notes, Committee members included Kerkstra, Doug DeVos, other

---

[2] It is unclear who wrote these notes and appellants have offered no record citation of their authentication.

high-level Amway executives, and Bill Zeoli, who had previously worked as an outside consultant on Amway's behalf. The notes indicate that Amway would not take sides and that its primary concerns were to "1. protect the little guy, 2. maintain tool income for those who depend, and 3. [make sure that] Amway revenue will not suffer." These notes and the record as a whole suggest that Amway's primary focus was on avoiding a negative impact on its products distribution business.

The founders asked Zeoli for his assistance in negotiating the breakaway and considered him to be a neutral mediator. In July 1997, Zeoli left a voice message for the founders "to report on the responsibility assignment you have given me." Zeoli explained in the message that DeVos would not be involved in these negotiations, but that Kerkstra would be involved because he was "the authority over the rules and regulations." The purpose of the message was to notify the founders that Jeff Yager was willing to have a "non-war" meeting with them. Zeoli also suggested that the founders pay Dexter Yager a percentage of each tape sold by Pro Net, assuming that neither group's downlines were "raided" by the other.

Early in 1998, the parties had many meetings to facilitate the breakaway. Kerkstra remembers attending several meetings with both Dexter and Jeff Yager and the founders "to avoid injuring as many distributors involved as possible." Kerkstra also acknowledged that if pricing was discussed at the meetings, he would have been there to hear it, but stated that

Amway would not discuss specific pricing regarding a non-Amway product, such as InterNET's and Pro Net's BSMs. Gooch also remembered that BSM pricing and a payment to Dexter Yager were discussed at these meetings, but offered no further specifics.[3]

During this period of negotiation, the founders sought and received confidential "pin level" and line of sponsorship information from Amway. Pin levels are a means of distinguishing top earners within a line of sponsorship. The founders requested this information to create a compensation plan for Pro Net that accurately reflected the productivity of each distributor within their lines of sponsorship.

A sticking point between the parties was the tools created by InterNET that featured founders, such as motivational audio tapes on which a founder was the primary speaker. The founders argued that these tapes were their property and should be given to them upon breaking away from InterNET. InterNET, and thereby Jeff and Dexter Yager, insisted, however, that "[i]t has been the understanding of the entire organization that in exchange for InterNET recording, editing, marketing, manufacturing, and distributing [the tapes] in single quantities that we own and supply this material." The parties eventually agreed that InterNET would supply the master versions of the tapes on condition that Pro Net pay a royalty fee

---

[3] Founder Childers had no recollection of Amway's involvement in negotiating the breakaway from InterNET.

of $.14 per tape to InterNET. Additionally, each side agreed not to solicit the other's downlines. The royalty payments continued through 2000 and totaled just over $1 million.

The formation of Pro Net had negative consequences for appellants. Though the parties disagree as to the direct cause, appellants experienced decreased sales and market share, and, in some cases, the failure of their business after Pro Net's formation. Appellants filed suit against Amway, alleging that Amway and Pro Net, and at times, InterNET, were involved in an antitrust conspiracy. Appellants asserted that Pro Net was a sham corporation organized to allow Amway to gain greater control over the BSM market. According to appellants, Amway and Pro Net conspired to allocate customers and fix prices within the tools business in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Appellants also alleged injurious falsehood, tortious interference, and violations of RICO, 18 U.S.C. § 1962.

II.

The district court granted summary judgment to Amway, dismissing appellants' claims of antitrust conspiracy, injurious falsehood, and tortious interference. We review a district court's grant of summary judgment *de novo*, *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1489 (8th Cir.1992), and view the evidence in the light most favorable to the nonmovant. *Flegel v. Christian Hosp. Northeast-Northwest*, 4 F.3d 682,

685 (8th Cir.1993). To survive a motion for summary judgment, appellants "must establish that there is a genuine issue of material fact" such that their claim should proceed to trial. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). This standard requires more than "some metaphysical doubt as to the material facts." *Id.* at 587, 106 S.Ct. 1348. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.*

A.

Appellants argue that the district court "misunderstood the nature and scope of the conspiracy" when it granted summary judgment to Amway on appellants' antitrust claims. Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. *See also, Blomkest Fertilizer, Inc., v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032 (8th Cir.2000) (en banc) ("*Section 1* prohibits concerted action by two or more parties in the restraint of trade."). "[I]t was intended to prohibit only unreasonable restraints of trade." *Bus. Elecs. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 98, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984)).

Appellants' claims of price-fixing and customer allocation agreements are among the "most elementary" violations. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir.1994), and are generally subject to a *per se* analysis. *Id.* (citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990)). "If an alleged restraint falls within the category of restraints subject to *per se* analysis, a plaintiff need not prove its anticompetitive effects." *Flegel,* 4 F.3d at 686 (emphasis added).

We conclude that appellants' claims of antitrust conspiracy were appropriately dismissed. The record shows that appellants failed to exclude the possibility of independent action, have attempted to characterize vertical constraints as a horizontal restraint conspiracy, and have set forth factual allegations that do not demonstrate the existence of any unlawful restraint of trade.

1.

Even in *per se* cases, "antitrust law limits the range of permissible inference from ambiguous evidence in a § 1 case." *Matsushita,* 475 U.S. at 588, 106 S.Ct. 1348. Thus, a party seeking damages for a § 1 violation must present evidence that "tends to exclude the possibility of independent action" by the alleged co-conspirators. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). "Independent action is not proscribed." *Id.* at 760, 104 S.Ct. 1464. "This means

that conduct that is 'as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.'" *Blomkest Fertilizers, Inc.*, 203 F.3d at 1032 (citing *Matsushita*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

Appellants argue that they are not required to disprove independent action because they have provided direct evidence of Amway's involvement in an unlawful conspiracy. They contend that the requirement that independent action be excluded is limited to cases in which the plaintiff relies solely on circumstantial evidence. *Rossi v. Standard Roofing*, 156 F.3d 452, 466 (3d Cir.1998) ("Under our jurisprudence, the Matsushita standard only applies when the plaintiff has failed to put forth direct evidence of conspiracy."); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir.2003) (appearing to single out circumstantial evidence for the requirement that independent action be excluded as a possibility).

We apply *Monsanto* and *Matsushita* broadly, *Blomkest*, 203 F.3d at 1032, and have not made such a distinction; we require a showing of independent action, whether it be by circumstantial or direct evidence. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir.2004) ("Although it may be in the form of circumstantial evidence, a plaintiff must present some evidence that tends 'to exclude the possibility that the alleged coconspirators acted independently.'"). *Monsanto* recognizes that

either direct or circumstantial evidence may satisfy this requirement. 465 U.S. at 764, 104 S.Ct. 1464. Although the presentation of direct evidence of an unlawful conspiracy will likely preclude a lawful explanation, it does not follow that the possibility of independent action need not be excluded when direct evidence is provided.

Despite appellants' claims of direct evidence of a conspiracy, the record suggests independent action by Amway. As the district court found, Amway was likely involved in the breakaway for the primary purpose of protecting its products business and perhaps secondarily as a means of limiting Dexter Yager's influence over its products business – both of which are admittedly lawful aims. Much of the evidence presented by appellants as support for their conspiracy theory in fact supports Amway's independent role. The antitrust primer, legal assistance, model contracts, and suggestions that Pro Net seek outside counsel (which it did) all imply that Amway was interested in Pro Net setting up a legitimate and sustainable enterprise. Although appellants attempt to attach a sinister motive to Kerkstra's involvement, it appears that he was involved to ensure that Amway's rules were followed. That Amway was interested in keeping the peace or, as appellants stress, avoiding a war, does not necessitate the finding of the use of unlawful means. If Pro Net was involved in unlawful activities or was even an unlawful enterprise in itself, no evidence presented suggests that

Amway was aware of this illegality, let alone acting with Pro Net to this end.

Appellants acknowledge that Amway was motivated by its desire to protect its products business and weaken Dexter Yager's control, but they argue that Amway's motivation to join the conspiracy should not be confused with the focus of the conspiracy itself, which was "to maintain control over the segment of the BSM industry in the Pro Net Founders' Line of Affiliation." Appellants theory, however, requires the court to assume the existence of an illegal conspiracy and to then view the facts in light of this understanding, an impermissible question – begging procedural gambit on appellants' part. *Blomkest,* 203 F.3d at 1033. A more natural reading of the facts is that Amway was not only motivated by the desire to protect its products business, but that peaceful resolution of a contentious breakaway was in fact the end Amway sought.

2.

More importantly, the role Amway played in this separation was not as a horizontal competitor, but as a vertical quasi-parent company interested in the survival of its primary business. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Bus. Elecs. Corp.,* 485 U.S. at 730, 108 S.Ct. 1515. For

appellants to succeed in their claims of *per se* antitrust violations, they must show that Amway was in direct competition with Pro Net and InterNET and that it was taking steps with its co-conspirators to restrain trade. *See ES Dev. Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 556 (8th Cir.1991) ("The classic form of a per se § 1 Sherman Act violation is a combination, conspiracy or agreement between competitors at the same level of the market to restrain competition; the so-called 'horizontal' restraint of trade.").

In an attempt to establish the existence of a horizontal relationship, appellants put significant weight on our earlier decision that recognized that Amway has its own tool business. *See Nitro Distrib., Inc. v. Alticor, Inc.*, 453 F.3d at 997. Amway's tool business, however, is limited to books written by Amway's creators, general marketing material, and free conventions for Amway distributors. It is a small fraction of Amway's overall business and does not meaningfully compete with companies like InterNET and Pro Net, and appellants' evidence does nothing to suggest otherwise. Similarly, appellants provide no factual support for their assertion that Pro Net was organized as a sham corporation through which Amway could sell BSMs. Once again, appellants' theories are cognizable only if a conspiracy is assumed. Without this assumption, Amway's motivations and actions are all vertical – between quasi-parent company and distributor, not horizontal competitors. Vertical nonprice restraints are not *per se* illegal. *Bus. Elecs. Corp.*, 485 U.S. at 724, 108 S.Ct. 1515 (quoting *Cont'l*

*T.V., Inc., v. GTE Sylvania Inc.*, 433 U.S. 36, 58, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)).

3.

Stripping appellants' argument of the assumptions necessary for its support further reveals that appellants' evidence does not connect Amway with any unlawful restraint of trade. Although appellants have shown that Amway was involved in the breakaway, there is no evidence that the breakaway itself was unlawful. Appellants ascribe three unlawful components to the breakaway: a "pay-off" tied to a customer allocation agreement, price-fixing, and Pro-Net's inherent illegality. We address each of these in turn.

What appellants have labeled a "pay-off" is described throughout the record as a royalty fee from Pro-Net to InterNET for Pro-Net's use and reproduction of the tapes originally produced by InterNET. Other than substituting "pay-off" for "royalty fee," appellants have provided no basis for assuming that this payment was anything other than what it purported to be. That the royalty fee was suggested by Zeoli in connection with a non-solicitation agreement does not transform it into an unlawful bribe.[4]

---

[4] Appellants stress the fact that the royalty fee and non-solicitation agreement were initially suggested by Zeoli in support of their assertion that Zeoli was acting as an agent for Amway. Zeoli's agency status is unclear. Although Zeoli had previously worked on Amway's behalf to resolve disputes and is

(Continued on following page)

The parties were involved in contentious negotiations, and making lawful concessions to maintain peaceful business relations does not violate antitrust laws.

Appellants also mischaracterize Pro Net's and InterNET's agreement not to solicit one another's downline. At the center of the breakaway was a disentanglement of the lines of sponsorship stemming from Dexter Yager on the one hand and the founders on the other. Without this separation, there could be no breakaway. Amway's antitrust primer envisions separation of BSM lines of sponsorship as a form of dispute resolution. And, as stated in appellants' brief, two accepted rules of the BSM industry are that "a distributor should only buy BSMs from, and attend the functions, [sic] of his upline, and . . . a distributor should not sell BSMs to another's downline without the other's consent and without fairly compensating him." This rule is a reflection of Rule 10(d) of Amway's Rules of Conduct for Amway Distributors. In essence, Pro Net and InterNET simply agreed to follow these rules and not solicit the other's downline.

This arrangement does not violate § 1. In *In re Amway Corp.*, the Federal Trade Commission (FTC)

---

listed as an Amway Steering Committee member on the unattributed Committee notes, it was Pro Net founder Childers who approached Zeoli for help in mediating the separation. We need not resolve this issue here, however, because Zeoli's proposal neither suggested nor precipitated unlawful activity attributable to Amway.

addressed the legality of these rules in Amway's products business. 93 F.T.C. 618 (1979). The FTC concluded that the line of sponsorship system is vertically imposed and is "reasonably ancillary to compensation, efficient distribution, and training." *Id.* Although Pro Net and InterNET are horizontal competitors, their agreement merely affirmed this vertically imposed system.

Appellants also allege that Amway participated in a conspiracy to fix prices. Their purported "direct evidence" of conspiracy is that Kerkstra and Zeoli attended meetings at which BSM pricing was discussed and that Amway provided confidential line of sponsorship information to Pro Net. Kerkstra admitted that he may have attended meetings where pricing was discussed, and a former member of Pro Net testified that Amway was involved in Pro Net and Global's setting of prices. Appellants, however, provide no detail or context to these discussions and instead leave us to speculate as to their possible implications. Some context is provided in Jeff Yager's May 8, 1998, letter to Global and the founders, which recaps a pivotal meeting at which the pricing of BSMs sold by InterNET to Pro Net were discussed. Appellants offer no evidence that anything more sinister than this was discussed with regards to pricing. Without greater detail, appellants' allegations of price-fixing are without merit.

A greater leap of logic must be made in order to infer price-fixing from Amway's disclosure of confidential line of sponsorship information. Appellants

themselves testified that this information was used to prepare a compensation plan for Pro Net's line of sponsorship. Their expert explained why this information was valuable to Pro Net in setting their compensation plan. The information detailed the actual, current productivity level of each distributor, while those not privy to this information knew only the highest pin level that had ever been attained by a distributor. With this information, Pro Net was able to compensate a distributor at his current level of productivity rather than at a level that a distributor had previously attained but had not maintained. While it may have been inappropriate for Amway to disclose information it had deemed confidential, the disclosure in no way suggests a conspiracy to fix prices.

Finally, appellants assert that Pro Net was an illegal association. Their argument lacks factual or legal support.[5] Appellants incorrectly equate breakaway with illegal association. Though they have shown that Amway's legal counsel offered assistance with the breakaway, it does not follow that Amway actively participated in the formation of an illegal association or conspiracy.

---

[5] Throughout their brief, appellants' proffered record citations lead us to their own motions filed before the district court. A review of these motions leads us often to exhibits filed with the district court, but not included in the record on appeal.

B.

Appellants argue that the district court erred in placing upon them the burden of showing fraudulent concealment, which resulted in the dismissal of Netco and Schmitz & Associates' antitrust claims as time barred. An antitrust claim "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. A cause of action accrues "when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). Netco and Schmitz & Associates dissolved on July 21, 1999, and filed this cause of action more than four years later.

In its motion for summary judgment, Amway successfully argued that the statute of limitations period had run. The burden then shifted to appellants to present an issue of material fact showing that Amway had fraudulently concealed the alleged conspiracy from Netco and Schmitz & Associates. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1051 (8th Cir.2000); *Tayborn v. Burstein*, 748 S.W.2d 824, 826 (Mo.Ct.App.1988) (noting that nothing in the record supports plaintiff's burden of showing fraudulent concealment and therefore summary judgment to defendant was proper). The moving party does not bear the burden of "showing the absence of a genuine issue of material fact," but instead must show that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d

265 (1986). Appellants did not plead fraudulent concealment in their complaint. Accordingly, the district court correctly put the burden on appellants and appellants failed to satisfy that burden.

C.

Appellants argue that their injurious falsehood conspiracy claim should not have been dismissed on summary judgment.

> In a claim for injurious falsehood, one who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

*Wandersee v. BP Prods. of N. Am., Inc.*, 263 S.W.3d 623, 628 (Mo.2008) (citing *State ex rel. BP Prods. of N. Am., Inc. v. Ross*, 163 S.W.3d 922, 928 (Mo.2005) (en banc)) (internal quotations and emphasis omitted).

Appellants alleged in their amended complaint that Amway made the statements giving rise to this claim. In their suggestions in opposition to Amway's motion for summary judgment, appellants for the first time attributed the previously unspecified

statements to Amway's alleged co-conspirators, rather than to Amway itself. As the district court ruled, appellants have not shown that a conspiracy existed and therefore cannot hold Amway liable for statements made by alleged co-conspirators. Additionally, the district court correctly held that, having failed to comply with the court's order to provide "information linking specific individuals with specific statements, conduct, or occurrences," appellants would not be permitted to rely upon the belatedly disclosed statements. *See* Fed.R.Civ.P. 37(c)(1).

D.

Appellants argue that the district court erred in dismissing their tortious interference claim. A claim of tortious interference with a contract or business expectancy under Missouri law requires appellants to show: "(1) a contract or valid business expectancy; (2) [Amway's] knowledge of the contract or relationship; (3) a breach induced or caused by [Amway's] intentional interference; (4) absence of justification; and (5) damages." *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 316 (Mo.1993) (citing *Cmty. Title v. Roosevelt Fed. Sav. & Loan*, 796 S.W.2d 369, 372 (Mo.1990) (en banc)).

Appellants have not shown that Amway lacked justification for its actions. Under Missouri law, "[a] plaintiff has the burden of producing substantial evidence to establish a lack of justification," and further, "[i]f the defendant has a legitimate interest, economic

or otherwise, in the contract or expectancy sought to be protected, then the plaintiff must show that the defendant employed improper means in seeking to further only his own interests." *Id.* at 316-17.

As noted above, Amway had a legitimate economic interest in an orderly breakaway because a disruptive separation within the tools business could have negative ramifications on Amway's closely related products business. Given this interest, appellants bore the additional burden of showing that Amway employed improper means. "[I]mproper means are those that are independently wrongful, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade, or any other wrongful act recognized by statute or the common law." *Id.* at 317. Appellants failed to meet this burden. Their allegations of improper means simply recount purported actions taken by Amway that adversely affected them. Such conclusory allegations without explanation of impropriety or an absence of justification do not create material issues of fact.

III.

Appellants argue that the district court erred in dismissing their RICO claim and in not granting them a second extension of time in which to amend their complaint to replead this claim. We review a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo, Misischia v. St. John's Mercy Health Sys.*, 457 F.3d 800, 802 (8th

Cir.2006), and review a denial of an extension of time to amend a pleading for abuse of discretion. *See Amrine v. Brooks,* 522 F.3d 823, 833 (8th Cir.2008).

Section 1962 of the RICO Act makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). A violation of § 1962(c) requires appellants to show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). A pattern is shown through two or more related acts of racketeering activity that "amount to or pose a threat of continued criminal activity." *Wisdom v. First Midwest Bank,* 167 F.3d 402, (8th Cir.1999) (quoting *United HealthCare Corp., v. Am. Trade Ins. Co.,* 88 F.3d 563, 571 (8th Cir.1996)).

Appellants' RICO claim was dismissed without prejudice for failure to set forth the predicate acts of mail and wire fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) requires that a party alleging fraud or mistake "state with particularity the circumstances constituting a fraud or mistake." Fed.R.Civ.P. 9(b); *see Murr Plumbing, Inc. v. Scherer Bros. Fin. Srvcs. Co.,* 48 F.3d 1066, 1069 (8th Cir.1995) (citing 18 U.S.C. §§ 1341, 1343) (holding that Rule 9(b)'s heightened

pleading requirement applies to allegations of mail and wire fraud used as predicate acts for a RICO claim). Appellants' amended complaint alleges in very general terms that Amway engaged in racketeering that "involved the use of the interstate telephone and the U.S. mails on a number of occasions. . . ." The district court correctly dismissed the claim for lack of particularity.

Following this dismissal, the district court gave appellants until January 15, 2007, to amend their pleading to properly state a RICO claim. The district court later granted an extension to February 5, 2007. On the day their amended complaint was due, however, appellants filed a second motion for an extension of time, this time requesting an extension to July 2007, sixty days prior to the close of discovery. In the alternative, appellants indicated that ten days would be sufficient.

Appellants' contention that additional discovery was necessary to remedy their defective RICO claim is belied by their acknowledgment that a ten-day extension would suffice, which suggests that appellants had adequate information at the time, yet failed to amend their pleadings within the extension allotted. Appellants assumed the risk of waiting until the day their amended complaint was due to request additional time. Additionally, we find unpersuasive appellants' reliance on *Abels v. Farmers Commodities Corp.*, 259 F.3d 910 (8th Cir.2001), for the proposition that their extension should have been granted so that further discovery could be conducted prior to

repleading their RICO claim. As an initial matter, the plaintiffs in *Abels* provided more detail regarding the alleged mail and wire fraud than appellants provided here. *Id.*, at 918-19. More importantly, the *Abels* plaintiffs provided this information prior to the commencement of discovery. *Id.* at 921. As we noted, "a court cannot reasonably expect highly specific allegations before allowing at least a brief discovery period." *Id.* At the time appellants filed their second motion for an extension of time, however, discovery had been ongoing for five months. Accordingly, the district court did not abuse its discretion in denying the second motion for an extension of time.

IV.

Appellants argue that the district court abused its discretion in denying various discovery requests. *See Pleasants v. Am. Express Co.*, 541 F.3d 853, 859 (8th Cir.2008) (standard of review). Appellants' primary complaint is with the district court's return of eleven boxes of documents produced by William Florence.

Florence, a resident of Georgia, was a former board member of the Independent Business Owners Association International (IBOAI), a trade organization representing Amway products distributors. On July 17, 2007, appellants subpoenaed documents Florence had in his possession as a result of his position on the IBOAI board. These documents likely fell within a Michigan state court order requiring

Florence to return any confidential documents to the IBOAI. Because Florence failed to respond to the subpoena, appellants filed a motion to enforce the subpoena in the United States District Court for the Middle District of Georgia. On November 19, 2007, the Georgia district court ordered production of the documents to the district court, rather than directly to appellants, because "the judge presiding over the underlying action in which these documents may be relevant and for which they have been subpoenaed is in the best position to determine whether the documents should be disclosed."

After conducting an in camera inspection, the district court determined that the documents were "unworkable." Specifically, the court found that numerous documents were duplicative, privileged, and outside the scope of the pending litigation. On January 11, 2008, the court returned the documents to the source from which they came and instructed appellants that if they wished to produce these documents they must present them to the court in a more manageable condition.

Appellants issued a second, more narrow subpoena, but by that time the documents had been returned to the IBOAI pursuant to a court order. Appellants did not subpoena the documents from the IBOAI. Nor did they file a motion pursuant to Federal Rule of Civil Procedure 56(f) alerting the district court to their need for further discovery to respond to Amway's motion for summary judgment.

District courts are allowed great latitude in discovery matters. *Pleasants*, 541 F.3d at 859 (citing *Executive Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 570 (8th Cir.2008)). The district court did not abuse its discretion in determining that appellants should not have access to numerous unresponsive and privileged documents and that neither the court nor Amway should be responsible for sorting through the eleven boxes. Rather, the court concluded that appellants should seek a more streamlined production.

Contrary to appellants' characterization, the returning of the documents did not amount to a denial of discovery. This is made clear by appellants' subsequent subpoena of the same documents. If appellants required more time to acquire the documents, they were free to file a Rule 56(f) motion. Appellants will not now be heard to claim that these documents "presumptively could have been used to avoid summary judgment." "Unless a party files an affidavit under [Rule] 56(f) showing what facts further discovery may uncover, a district court generally does not abuse its discretion in granting summary judgment on the basis of the record before it." *Ballard v. Heineman*, 548 F.3d 1132, 1137 (8th Cir.2008) (citing *Nolan v. Thompson*, 521 F.3d 983, 986 (8th Cir.2008)).

We have considered appellants' remaining discovery challenges and conclude that they fail to establish any abuse of discretion by the district court.

The judgment is affirmed.

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION**

| | | |
|---|---|---|
| **NITRO DISTRIBUTING, INC., et al.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 03-3290-CV-S-RED** |
| **v.** | ) | |
| **ALTICOR, INC., et al.,** | ) | |
| **Defendants.** | ) | |

## ORDER

(Filed Feb. 8, 2008)

Now before the Court are Defendants' Summary Judgment Motion No. 1: Dismissing Plaintiffs' Antitrust Claims (Doc. 532), Defendants' Summary Judgment Motion No. 3: Dismissing Plaintiffs' Claims for Injurious Falsehood and Civil Conspiracy (Doc. 526), Defendants' Summary Judgment Motion No. 4: Dismissing Plaintiffs' Claims for Tortious Interference and Civil Conspiracy (Doc. 528), and Plaintiffs' Motion for Partial Summary Judgment on Count II (Doc. 534).

## BACKGROUND

I. Parties

Plaintiffs in this matter are Nitro Distributing, Inc. ("Nitro"), West Palm Convention Services ("West Palm"), U-Can-II, Netco, and Schmitz & Associates

("Schmitz Associates"). Plaintiffs are all entities involved in the business of selling tools or functions referred to herein as the "BSM" business. Defendants are Alticor, Inc., Quixtar, Inc., and Amway Corporation, collectively referred to as "Amway" for purposes of this Order.

Ken Stewart is a principal owner of Nitro and West Palm; Brig and Lita Hart are principals of U-Can-II; and Charlie and Kim Schmitz are principals of Netco and Schmitz Associates. These principals also owned and operated Amway products distribution businesses. Plaintiffs' principals and their respective products distribution businesses are not parties to this action.

II. Amway Business

Amway was founded in 1959 and offers people an opportunity to own their own businesses as independent distributors of Amway products. Amway manufactures and sells home care products, health and beauty products, and "home tech" products; Amway also sells third-party products and services. Amway sells its products through a vertical marketing system consisting of a network of distributors who sell Amway products and in turn sponsor others to sell Amway products. To increase their overall business, distributors help and encourage the distributors whom they have sponsored to increase their sales volume and to sponsor other distributors. With each new distributor sponsored, a "downline" is

created. When a downline distributor in turn sponsors other distributors, a line of sponsorship is formed. The Amway Rules of Conduct contain several provisions for maintaining the integrity of the lines of sponsorship.

The structure of Amway was not originally conceived to include lines of sponsorship; the concept of lines of sponsorship began in the early 1970s with Dexter Yager at the forefront. Yager is considered the leader of one of the largest Amway products distribution organizations in North America. (Pls.' Ex. 18). Plaintiffs' principals (Stewart, the Harts, and the Schmitzes) as well as the named alleged co-conspirators – Hal Gooch, Jr., Bill Childers, Tim Foley, Steve Woods, and Jimmy Dunn – were all directly or indirectly sponsored by Yager in the Amway products business.

III. BSMs Business

Amway products distributors are responsible for training and motivating the downline products distributors in their line of sponsorship. From this need for training and motivation, the business support materials ("BSMs") business was born. BSMs, including audio and video tapes, CDs, books, seminars, rallies, and other tools, are useful tools in providing training and motivation. These motivational materials are used to train Amway products distributors respecting the Amway business, to motivate them to sell to their highest possible potential,

and to recruit new Amway products distributors. Amway prohibited its products distributors from being in the BSMs business. Therefore, separate entities were established by certain principals of product distribution businesses to run their BSMs distribution businesses. Plaintiff Netco was an exception; however, for purposes of these motions the dual status of Netco is not significant.

Within the BSMs business, lines of affiliation have formed, representing a collection of BSMs distributors associated for purposes of distributing and selling BSMs. The lines of affiliation distribute their own branded BSMs specific to the Amway product distribution business and to their particular line of affiliation. Though the BSMs lines of affiliation generally follow the lines of sponsorship in the Amway products business, the lines of affiliation are not identical to the lines of sponsorship. The Amway Rules of Conduct require product distributors to stay within their lines of sponsorship; however, the Amway Rules of Conduct do not apply to the BSMs business. *Nitro Distrib., Inc. v. Alticor, Inc.*, 453 F.3d 995, 998 (8th Cir. 2006). Therefore, Amway has no authority to require strict enforcement of the lines of affiliation established in the BSMs business. Amway's stated position was that the purchase of BSMs was optional and that distributors were free to buy BSMs from any source. Because Amway product distributors could purchase from any source, all entities selling BSMs were technically competitors.

Since the Amway Rules of Conduct did not apply to the BSMs business, certain unwritten practices were developed through a course of dealing within the BSMs industry. Distributors were taught by their upline to maintain the integrity of the lines of affiliation, only looking to their immediate upline of the same or higher Amway pin level for BSMs purchases. BSMs distributors were also taught that a pin-level distributor in the line of affiliation could only be passed over with respect to tools purchases with his consent and with fair compensation. Distributors were taught that such rules were critical to the success of their BSMs businesses and the integrity of their BSMs network.

Until 1998, Yagers' InterNET business was the exclusive producer of BSMs to the Hal Gooch/Bill Childers line of affiliation, which included all Plaintiffs herein.

IV. Formation of Pro Net

Sometime between 1996 and 1997, several leaders in the Gooch/Childers line of affiliation, including Ken Stewart, Hal Gooch, Bill Childers, Steve Woods, and Tim Foley, began discussing among themselves their unhappiness with InterNET and the possibility of breaking away from InterNET. These individuals would become the founders of Pro Net and formed the Pro Net Steering Committee. Paul Brown, business manager for Bill Childers, was tasked with contacting Amway for help and guidance with the breakaway.

Amway was well aware that line of affiliation breakaways or splits had the potential to cause both short term and long term problems for the individuals involved and their Amway businesses, which in turn had the potential to disrupt Amway's business operations. Amway recognized that it needed to help manage such situations and attempt to minimize the possible negative consequences. Amway was particularly concerned with this breakaway because it involved a dispute between several of the highest level distributors within the Amway system. Because of this, Amway formed a steering committee to monitor the Gooch/Childers breakaway from Yager. Throughout 1997 and 1998, Amway was in communication with the Pro Net Steering Committee, and several Amway executives attended meetings at which the breakaway was discussed.

Early in the breakaway discussions, Gooch and Childers were concerned that Yager would "raid" or solicit their downlines if they were to break away from InterNET. Confronted with these concerns, Childers contacted Billy Zeoli in June of 1997 to facilitate the breakaway from InterNET. Shortly after he was asked to serve as an intermediary, Zeoli, an independent contractor and member of the Amway steering committee, offered the following suggestion in a phone message to the Pro Net founders:

> Also, dealing with the discussion, if you do leave, is a consideration of giving Dexter a percentage of each tape, which if the relationship went well during the transition with

> each people's group's [*sic*] not being identified and raided there would be that possibility.

Nearly one year later, in a letter dated August 24, 1998, Pro Net agreed to remit a quarterly "upline royalty" to Yager. Amway's Distributor Relations Report dated December 12, 1997 from John Parker to several Amway executives noted that the Pro Net founders would "continue to pay and edify Dexter while taking more control over the BSMs used in their organization."

Pro Net officially began operations in the summer of 1998. At Pro Net's inception, Plaintiffs all received their BSMs from Global Support Services, Inc., the exclusive supplier of BSMs to Pro Net members. The Pro Net Steering Committee was responsible for setting the prices at which Global would sell its BSM s to its customers.

## V. Plaintiffs' Difficulties After the Formation Pro Net

### A. U-Can-II

In October of 1999, U-Can-II was suspended from Pro Net for one year for producing and using business support materials and literature that had not been approved by the Pro Net Steering Committee. U-Can-II protested its suspension in a letter to the Pro Net Steering Committee and copied Amway executive, Bob Kerkstra. Amway ultimately declined getting involved in what it characterized as a private dispute regarding participation in the BSMs business.

In February 2000, Gooch told approximately 40 Emerald pin level distributors of Brig and Lita Hart that they should all communicate directly with the Gooches due to the possibility that the Harts were going to lose their distributorship. No Amway executives were on hand when Gooch made his announcement.

B. Nitro and West Palm

Shortly after the formation of Pro Net, Ken Stewart was scheduled to speak at Free Enterprise in February 1999. Before the event, Gooch determined he could not allow Stewart to speak, ostensibly for the reason that Stewart was divorced. Stewart was further prevented from speaking at a function in October 1999. In December 1999, Stewart learned he had been suspended from the Pro Net Steering Committee ostensibly due to inappropriate conduct. Kerkstra was aware Stewart had been suspended.

C. Netco and Schmitz Associates

Charlie Schmitz voiced opposition to the formation of Pro Net and initially declined membership in Pro Net. When Schmitz eventually completed a Pro Net Membership Application, he included a handwritten condition that he would not give up his right to buy, sell, or produce BSMs from other suppliers or manufacturers. His membership application was ultimately declined. After this, Schmitz believed the Pro

Net Steering Committee effectively blackballed him from participation in the BSMs business.

## DISCUSSION

I. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1075 (W.D. Mo. 1999). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an essential element to that party's case on which that party will bear the burden of proof. *See Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010, 1014 (W.D. Mo. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986) (footnote omitted). "The nonmoving party must

come forward with 'specific facts showing that there is a *genuine issue* for trial.'" *Id.* at 587 (citing Fed. R. Civ. P. 56(e)).

When ruling on a motion for summary judgment, the court shall view the facts in a light most favorable to the nonmoving party and allow the nonmoving party the benefit of all reasonable inferences to be drawn from the evidence. *See Fry*, 72 F. Supp. 2d at 1075 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Reed v. ULS Corp.*, 178 F.3d 988, 900 (8th Cir. 1999)).

## II. Antitrust Claims

The antitrust claims of Plaintiffs Netco and Schmitz Associates have previously been disposed of by summary judgment in favor of Amway. Therefore, the remaining antitrust claims are those of plaintiffs Nitro, West Palm, and U-Can-II. Their allegations can be summed up as three *per se* 15 U.S.C. § 1 violations: group boycott, customer allocation, and price fixing; and a claim for conspiracy to monopolize in violation of 15 U.S.C. § 2.

Amway argues, in part, that these Plaintiffs have failed to establish a conspiracy involving Amway.

### A. Applicable Law

Section 1 of the Sherman Act declares every contract, combination, or conspiracy to unreasonably restrain trade to be illegal. 15 U.S.C. § 1 (2000).

Unilateral action is not proscribed by the antitrust laws. *Willman v. Heartland Hosp. East,* 34 F.3d 605, 610 (8th Cir. 1994). Because § 1 requires that there be a contract, combination or conspiracy in order to establish a violation, the "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1964 (2007) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.,* 346 U.S. 537, 540 (1954)). Plaintiffs must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 764 (1984). To establish the existence of a contract, combination, or conspiracy, Plaintiffs must demonstrate that Amway and its co-conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. The evidence must be sufficient to warrant a finding that the conspirators had a "'unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement.'" *ES Dev., Inc. v. RWM Enters., Inc.,* 939 F.2d 547, 554 (8th Cir. 1991) (quoting *Am. Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946)). While there is the general rule for consideration of motions for summary judgment to allow the nonmoving party the benefit of all reasonable inferences, in the context of antitrust claims, "antitrust law limits the permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co.,* 475 U.S. at 588. Plaintiffs "must show that the inference of conspiracy is

reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]." *Id.*

The elements of a conspiracy to monopolize under 15 U.S.C. § 2 are: (1) the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) specific intent to monopolize. *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n,* 843 F.2d 1154, 1157 (8th Cir. 1988). If Plaintiffs fail to claim a conspiracy sufficient to support their § 1 claims, the § 2 conspiracy to monopolize claim necessarily fails. *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.,* 5 F. Supp. 2d 694, 711 (D. Minn. 1998).

B. Conspiracy

Plaintiffs' summary judgment briefing and arguments are "smothered" by the most extensive statement of facts this Court has ever seen. Plaintiffs' Master Statement of Facts (Doc. 558) sets forth 828 separate fact statements over 133 pages. While this is helpful to understand the Amway story, it also appears to reflect the difficulty even Plaintiffs have had in trying to set forth sufficient facts to support the conspiracy theory which is the heart of this case.

This Court requested oral argument to seek clarification of Plaintiffs' claims and identification of the relevant proof established during discovery to support their claims. Relevant statements from the oral arguments are as follows (citations are to the transcript dated January 24, 2008):

*Agreement to Conspire*

MR. LEONARD: The primary conspiracy was indeed launched by the agreement between InterNET and Pro Net to allocate customers and stay away from each other's customers.

(Tr. 41:20-22)

THE COURT: But if that is a limited – are we talking about several conspiracies in this case?

MR. LEONARD: No.

THE COURT: One great big one?

MR. LEONARD: That's the beginning of the conspiracy. Before that I do not – we do not maintain there was any kind of a conspiracy at all, no. That's the beginning of the conspiracy and that's when it started . . .

(Tr. 42:5-12)

MR. LEONARD: When the agreement occurs in May of 1998 is when the conspiracy actually begins, yes.

(Tr. 43:22-23)

THE COURT: So you're saying it exists and Amway's responsible for everything everybody says or does from that point forward?

MR. LEONARD: That's right.

(Tr. 42:17-20)

THE COURT: So tell me what Amway's conduct is that makes them a part of that conspiracy. We identified you said doing nothing. Or maybe – or Zeoli's role.

MR. LEONARD: Zeoli's role.

THE COURT: Do you think doing nothing could get you a part of the conspiracy under the –

MR. LEONARD: No.

THE COURT: So we're down to Zeoli's role.

MR. LEONARD: Zeoli's role, Grider's role –

THE COURT: But Grider happened before the agreement, right?

MR. LEONARD: No, but she offered – she offered their help to the ProNet breakaways. She said, 'We can help you with the breakaway.' And that is disparate. That's the only time, Your Honor – and we put this in our statement of facts, master statement of facts – that Amway treated this breakaway differently than they treated any other. They always stood back before and did nothing.

That doesn't make you a conspirator, I would admit. (Tr. 43 :25-44:18)

THE COURT: Did Grider have anything to do with the terms of the royalty?

MR. LEONARD: Not that I'm aware of.

THE COURT: So we're back to –

MR. LEONARD: Kerkstra and Zeoli did. They were aware of it very specifically.

(Tr. 46 lines 4-9)

MR. LEONARD: They were there when they started hammering it out. They weren't there the whole time, I'm sure.

(Tr. 46:19-21)

THE COURT: Is Zeoli employed by Amway?

MR. LEONARD: No, he's an independent consultant, Your Honor. He was a member of the steering committee with regard to this specific breakaway. (Tr. 47:16-19)

THE COURT: . . . If it wasn't through Zeoli, do you have any other actions there that would place Amway as part of a conspiracy when that agreement was reached for the royalty?

MR. LEONARD: No. I've recited the disparate from earlier breakaways, Ms. Grider's comment that we can help you with breaking away, and Zeoli's activities and Kerkstra's presence at the negotiations when they were talking about it certainly adds to it. That's the sum and substance of Amway's involvement in the conspiracy.

(Tr. 48:4-13)

Based on these discussions it is clear that Plaintiffs' claims are based on an alleged conspiracy between Amway, Pro Net, and InterNET which

Plaintiffs claim began with the agreement between Pro Net and InterNET pursuant to which Pro Net would pay an "upline royalty" to InterNET of 14¢ per audio tape sold and InterNET would agree not to solicit Pro Net customers. Plaintiffs claim the beginning date of this conspiracy was May, 1998. At that point in time the "sum and substance" of the evidence Plaintiffs purport to have to prove that Amway was a party to the conspiracy is:

1. The fact that Amway had declined to get involved with previous breakaways.

2. Amway's legal counsel (Sharon Grider) stated to Paul Brown in a telephone discussion on May 20, 1997:

   I was just bringing John [Peirce] up to speed so he understood what we were trying to accomplish today, and just basically what I told him was our conversation of last week whereby, you were looking for some overall assistance –

   and I'll be pretty blunt here – breaking away and how you set up everything, and I said we could help you with this part.

   (Doc. 558 ¶ 333).

3. Billy Zeoli, an independent consultant, who had consulted with Amway and helped Amway negotiate disputes with its products distributors in the past, and who had also been named to the Amway steering committee to monitor the breakaway of Pro Net members from InterNET, suggested to the

Pro Net founding members that they give consideration to, "giving Dexter [Yager] a percentage of each tape." The suggestion was made in a taped phone message dated August 4, 1997, which in full was as follows:

7:45 a.m. Remote message from Billy Zeoli

Good morning gentlemen, this is Billy Zeoli, talking to Hal Gooch, Tim Foley, Steve Woods, Ken Stewart, Billy Childers, Bill Childers . . . and Paul Brown. I would like to report to you on the responsibility assignment you have given me. Jeff Yager was here in Grand Rapids last night, the discussion and decision was as follows:

#1, if there is a possibility of a serious meeting . . . of discussion of working things out, discussing finance, Rick Setzer and other situations and you are willing to discuss that openly and clearly, the men mentioned in this memo are also willing to discuss it openly and clearly, not just another meeting. Jeff Yager said he is willing to have that meeting on that basis. I am pleased to hear that. Therefore, I have asked Jeff to put in writing, a letter of his discussions and feelings and how to view all of your Bahamas Island retreat meeting . . .

Doug DeVos will bring a manila envelope with 5 letters inside, exactly the same, to all of you. They will not know the contents of the letter and is not getting involved or will be involved in this issue.

Secondly, in talking with Jeff Yager, it was clearly defined between he and I that I would

attempt to be at that meeting and as requested by both sides listen to the discussion. Now if that meeting does not happen for some off reason or does not go properly, then there will be another meeting with Mr. Kerkstra as well, I will bring him to that meeting since he is the authority over the rules and regulations to discuss the possibility and clarity of a change in venue, a transition of these the gentlemen mentioned, Gooch, Foley, Woods, Stewart, Childers to their own situation with a discussion of a non-war w-a-r meeting to try and work that out.

That is where we are and that is what I have followed through on and that is the position we are in. Therefore, I would just ask you to consider that meeting of putting things together with the openness that is considered your part for probably for the very first time of Jeff doing that. Also, dealing with the discussion, frankly if you do leave, is a consideration of giving Dexter a percentage of each tape, which if the relationship went well during the transition with each people's group's [sic] not being identified and raided there would be that possibility.

So, that is where we are. I appreciate the privilege of working with you and for you and I will be looking forward to Douglas giving a letter to you when you leave here. I have also informed Doug Hal that you will be picked up in a boat and he will be the only one going with you to the situation. That Kerkstra and McDonald and anybody else there will go another way. Doug will be alone with you all. I would not overpump Doug with the situation and problems. Just become

close to him and enjoy the boat ride because Doug is phenomenal. He is a great person. So, that is the plan we are working on. I have tried to keep your wishes in heart to be fair. And to be fair to Jeff and Dexter as well. Love you all. I will be praying for you and thinking of you. I am looking. forward to seeing you in days to come. I guarantee . . . Bill Childers and Kenny Stewart that Doug will be at your rally at 2:30 on Saturday of Labor Day weekend to speak and to be there . . . Billy Z.

(Doc. 558 ¶ 336).

4. The fact that Amway employee Bob Kerkstra and consultant Billy Zeoli were present when Pro Net founding members met to discuss the breakaway and a possible payment to InterNET. Kerkstra was present at several such meetings.

As of May, 1998, this is the supporting evidence as summarized by Plaintiffs' counsel.

Since there is alleged to be only one conspiracy and May, 1998, is alleged to be the start of the conspiracy, all evidence that arises after this date must be considered in the context of whether it supports this original conspiracy and not whether it creates a new and different conspiracy. The requisite meeting of the minds must have occurred in May, 1998.

Any antitrust conspiracy must have a conscious commitment to a common scheme designed to achieve an unlawful objective. *Monsanto Co.*, 465 U.S. at 768. The objective of this alleged conspiracy has proven to

be somewhat of a moving target. However, during oral argument, Plaintiffs' counsel described it as follows:

> THE COURT: What I'm really interested in is for your statement of what the objective with Amway. What was Amway seeking here?
>
> MR. BOULWARE: Amway, No. 1, wanted to lessen Dexter Yager's clout. That's by this pull-out. No. 2, it wanted to endear itself as close as it could and tie itself in as closely as it could with the kingpins who were the Pro Net leadership . . .
>
> (Tr. 85:18-25)
>
> THE COURT: And my question is first the objective of the conspiracy and then how those statements would be considered in furtherance of that objective.
>
> MR. BOULWARE: Sure. The objective of the conspiracy, one overriding principle here going into it is to lessen Dexter Yager's clout so that the company is not as dependent upon him. If he pulls out and gets angry with them, at least they've got ProNet who's – and perhaps some other. That's the overall.
>
> THE COURT: So that conspiracy would be between ProNet and Amway?
>
> MR. BOULWARE: Yes.
>
> THE COURT: Not InterNET?
>
> MR. BOULWARE: No. No, no. The conspiracy we're talking about that George addressed – and I'm going back to that. And, by the way, we're not

trying to seek any damages in this prior to this time even though we think there may have been conspiracies or whatever. That's not what we're trying to say here. It's important to show the motive and how it developed and how we get to this point that Amway's going to join those people in this active, continuing conspiracy.

The conspiracy, I believe, started with the motive by Amway. The motive by the kingpins is to pull away from Dexter and they knew they couldn't do it without Amway. They could not do it without Amway's support. Paul Brown says that, says they discussed that, they knew it couldn't be done. So they needed Amway support. Amway support would be to lessen Dexter's clout. So they brought this marriage together and from that point on they had – they had to prop up ProNet.

(Tr. 87:24-89:3)

The objective of the conspiracy must also either be "unlawful" or represent, "a meeting of the minds in an unlawful arrangement." *ES Dev., Inc.*, 939 F.2d at 554. Plaintiffs describe the "unlawful" part as follows (Plaintiffs' counsel is referring to the presence of Kerkstra and Zeoli at meetings with Pro Net):

MR. LEONARD: They were there when they started hammering it out. They weren't there the whole time, I'm sure. There were several meetings between the – at least two meetings between the ProNet breakaway and the InterNET folks. But that illegal agreement, there can be no justification – did Amway have an interest? Sure,

they did. They didn't want that to happen. They didn't want a war. They didn't really care if they broke away. In fact, in the long run it probably gladdened them because as we have said, Dexter Yager was so big and so powerful that they had never had the temerity before that to ever back a dissident against Dexter Yager or anybody in his group. But at this point in time with about a half a million downlines under our clients being taken out from Dexter Yager's empire, Amway did get on board to loosen his hold over them. It's very clear –

THE COURT: Now, is that a bad thing for a company to do?

MR. LEONARD: No. No. We don't say that it's a bad thing for Amway to try to weaken Dexter Yager's power if they do it legally. But, unfortunately, they didn't. Zeoli got them into trouble when he suggested that there be a customer allocation. That made Amway a part of the deal.

THE COURT: Is Zeoli employed by Amway?

MR. LEONARD: No, he's an independent consultant, Your Honor. He was a member of the steering committee with regard to this specific breakaway . . .

(Tr. 46:19-47:15)

If the objective was to "lessen Dexter Yager's clout" and the alleged unlawful royalty arrangement and customer allocation was allegedly done to further that objective, it makes no sense to think that Dexter Yager or InterNET were part of that conspiracy. If the

objective was for Amway to "endear itself as close as it could and tie itself in as closely as it could with the kingpins who were the Pro Net leadership," it once again defies common sense to think that Dexter Yager or InterNET would be part of that conspiracy. There is no direct evidence of this and, for the reasons stated, there is no rational basis to make this inference.

The lynchpin of Plaintiffs' conspiracy theory is the alleged unlawful agreement for Pro Net to pay a royalty to InterNET in exchange for InterNET's agreement to not solicit Pro Net customers. Plaintiffs necessarily have to rely on this agreement since it is the claimed "unlawful objective," "unlawful arrangement," or "unlawful act" that is required to support their conspiracy theory. It is their reliance on this agreement which causes Plaintiffs to have to claim that InterNET is a party to the conspiracy. Yet for the reasons set forth above and in consideration of Plaintiffs' stated objectives of the claimed conspiracy, there is no logical or reasonable way to make the inference that there was a meeting of the minds between Amway, Pro Net, and especially InterNET to enter into the conspiracy claimed by Plaintiffs.

The evidence Plaintiffs have presented to support their conspiracy theory can basically be summarized as: (1) the suggestion by independent consultant Billy Zeoli for the Pro Net founders to consider giving Dexter Yager a percentage of each tape as a means of obtaining a resolution of their anticipated conflict related to their breakaway, and (2) a lengthy series of

events which Plaintiffs claim were negative to Plaintiffs' interests and which events were known by Amway and allowed to occur by Amway. Plaintiffs' counsel summed it up as follows in his oral argument: "As George said, we don't have direct evidence exactly what they did but they were there, Judge." (Tr. 57:20-21). This case is all about inference as there has been no direct evidence proffered to establish the existence of a conspiracy.

It is this lengthy series of events for which Plaintiffs claim "they [Amway] were there" that Plaintiffs ask the Court to consider, by inference, as supporting their conspiracy theory. This request must be considered in light of the limits placed on permissible inferences in a § 1 case by the *Matsushita Electric Industrial Co.* case wherein the Supreme Court stated Plaintiffs "must show that the inference of conspiracy is *reasonable* in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]." *Matsushita Elec. Indus. Co.*, 475 U.S. at 588 (emphasis added). This Court finds that Plaintiffs have not met this burden.

Plaintiffs are not allowed to make their case by first "assuming a conspiracy and then explaining the evidence accordingly." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F. 3d 1028, 1033 (8th Cir. 2000). Plaintiffs have recited a litany of actions taken by Pro Net and its leaders, as well as InterNET, which they claim support the conspiracy, i.e., the conspiracy that allegedly began in May, 1998.

Although even Plaintiffs recognize their evidence is weak in regard to Amway's direct involvement in much of the later activity, their counsel explained their position as, "in for a dime, in for a dollar." (Tr. 51:22). The Court will not lengthen this Order by reviewing all the alleged wrongs recited by Plaintiffs; however, it is noted that upon individual analysis it is difficult to see how the particular wrongs could be stated to have been done in furtherance of the conspiracy claimed by Plaintiffs. If not, of course, then "in for a dime, in for a dollar" does not apply. Many of these alleged wrongs can be summarized as simply power struggles between powerful businessmen wherein Plaintiffs got out-muscled, possibly even taken advantage of. But, there is a failure of evidence to link the alleged subsequent wrongful conduct to be in furtherance of the single conspiracy alleged to have been agreed to in May, 1998.

Finally, in regard to the circumstances surrounding the alleged formation of the conspiracy in May, 1998, Plaintiffs have failed to exclude the possibility that Amway was acting independently in its involvement with Pro Net and InterNET to protect its own interest. It is undisputed that Amway has a legitimate, unilateral interest in the integrity of its products business. In 1996, Amway identified eight major lines of sponsorship in the Amway business which included Dexter Yager, Bill Childers, Ken Stewart and Hal Gooch. As of January, 1998, all of the "players" in this case were considered to be in the InterNET (Yager) line of affiliation for BSMs

purchases. Yager controlled a significant part of Amway's product distribution business and his BSMs company InterNET controlled a significant part of the BSMs business. Even Plaintiffs agree that, "Amway feared, and rightfully so, that if Yager became displeased with Amway, he could . . . deal a severe, if not fatal, blow to Amway's independent sales force." (Doc 553 at 1). Therefore, it is a logical conclusion that when the founding members of Pro Net (Gooch, Childers, Woods, Stewart and Foley) indicated a desire to breakaway from InterNET (Yager), Amway took a keen interest in trying to be sure this move did not get out of control and cause disruption to its products business. There is nothing about the fact that Amway formed a steering committee to monitor this situation, that an Amway employee (Kerkstra) attended some meetings, and that an independent consultant (Zeoli) provided early communication between the parties and at one point suggested that Pro Net consider paying a percentage to InterNET, that negates Amway's stated role of simply trying to protect the integrity of its products business.

It is for the above stated reasons that this Court finds Plaintiffs have failed to present sufficient evidence to create a genuine issue of material fact to support Plaintiffs' claim that a single conspiracy between InterNET, Pro Net and Amway was formed in May, 1998, with the objective to lessen Dexter Yager's clout and tie Amway in as closely as it could with the Pro Net leadership. For purposes of argument, one could assume this was Amway's intent, but

it certainly could not be said there was a "meeting of the minds" or "common scheme" with InterNET on this objective. Since this fording is dispositive as to the antitrust claims, it is not necessary to rule the separate antitrust issues presented in the briefing.

III. Injurious Falsehood

In an action for injurious falsehood, the plaintiff has the burden of establishing: (1) publication of a false statement, (2) injurious to plaintiff's protected interest, (3) with the publisher's knowledge of the falsity of the statement or his reckless disregard as to its truth or falsity, (4) under circumstances which make reliance on the statement by third persons reasonably foreseeable, (5) the third-party's understanding of the statement in its injurious sense, (6) proximately causing pecuniary harm to plaintiff. *Annbar Assocs. v. Am. Express Co.*, 565 S.W.2d 701, 706-709 (Mo. Ct. App. 1978).

In their Amended Complaint, Plaintiffs alleged, in pertinent part, that Amway "represented to others that the Plaintiffs and/or their principals were not capable of providing effect leadership in training and motivating their downline by reason of one or more falsehoods." (Pls.' Compl. ¶ 216). However, in their Suggestions in Opposition, Plaintiffs abandon their reliance on statements made by Amway and instead identify, for the first time, several statements of Amway's alleged co-conspirators as the basis for Plaintiffs' claims for injurious falsehood. (Doc. 555 at

2 n.2). Thus, in order to hold Amway liable for these statements, Plaintiffs must establish that Amway conspired or had a "meeting of the minds" with those who made the alleged statements to commit the tortious act. *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., Inc.*, 931 S.W.2d 166, 175 (Mo. Ct. App. 1996). As discussed above with respect to Plaintiffs' antitrust claims, Plaintiffs have failed to demonstrate a genuine factual issue as to the existence of a conspiracy involving Amway. Consequently, Plaintiffs cannot rely on statements of alleged co-conspirators to hold Amway liable for these statements.

Moreover, these statements belatedly identified by Plaintiffs were not disclosed during discovery, even after the Court ordered Plaintiffs to supplement their interrogatory responses with more specific responses and with "information linking specific individuals with specific statements, conduct, or occurrences." (Doc. 298). This belated disclosure violates not only this Court's Order but Plaintiffs' duty to supplement interrogatory responses pursuant to Rule 26(e)(2) of the Federal Rules of Civil Procedure. Under Rule 37(c)(1), "[a] party that without substantial justification fails . . . to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence . . . on motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). As such, Plaintiffs are not permitted to use these statements in an attempt to refute summary judgment. With no evidence to support a conspiracy involving Amway or the

underlying injurious falsehoods, summary judgment in favor of Amway as to Plaintiffs' claims of injurious falsehoods and civil conspiracy is warranted.

IV. Tortious Interference

Under Missouri law, to establish a claim for tortious interference with a business contract or expectancy, the following elements must be proved: (1) the existence of a contract or valid business relationship or expectancy, (2) defendants' knowledge of the contract or relationship, (3) intentional inference on the part of defendants including or causing a breach of the contract or relationship, (4) said interference achieved without justification, and (5) damages to plaintiffs. *Deutsche Fin. Servs. Corp. v. BCS Ins. Co.*, 299 F.3d 692, 696 (8th Cir. 2002). Plaintiffs have the burden of producing substantial evidence to establish the absence of justification. *Cmty. Title Co. v. Roosevelt Fed. Sav. & Loan Ass'n*, 796 S.W.2d 369, 372 (Mo. 1990) (en banc). There is no impropriety of self-interested interference when a defendant has a legitimate economic interest in the contract or expectancy. *Friedman v. Edward L. Bakewell, Inc.*, 654 S.W.2d 367, 370 (Mo. Ct. App. 1983). Indeed, if a defendant is engaged in business in competition with plaintiffs, as a competitor, defendant is justified "in using lawful means in soliciting and procuring business even though its lawful conduct . . . ha[s] the effect of causing customers to refrain from doing business with the competitor-plaintiffs." *Downey v. United Weatherproofing*, 253 S.W.2d 976, 982 (Mo.

1953). If the defendant-competitor's conduct, however, "is directed solely to the satisfaction of spite or ill will and not in advancement of his competitive interests over [the competitor-plaintiffs], he is . . . not entitled to invoke his privileges as a competitor." *Id.* Thus, "[i]f the defendant has a legitimate interest, economic or otherwise, in the contract or expectancy sought to be protected, then the plaintiff must show that the defendant employed improper means in seeking to further only his own interests." *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 317 (Mo. 1993) (en banc). Improper means are "those means which are independently wrongful, notwithstanding injury caused by the interference," including threats, misrepresentations of fact, violence, restraint of trade, or any other wrongful act recognized by statute or the common law. *Cmty. Title Co.*, 796 S.W.2d at 373.

In the Amended Complaint, Plaintiffs alleged that Amway, "as active participants in the [ ] conspiracy, intentionally interfered with the well-established business relationships, expectancies and advantages of the Plaintiffs, using improper means, causing the breach or impairment of those relationships, advantages and expectancies." (Pls.' Compl. ¶ 212). Again, as discussed above, to the extent Plaintiffs' claim of tortious interference relies on the existence of a conspiracy involving Amway, the claim necessarily fails.

To the extent Plaintiffs allege Amway itself tortiously interfered with Plaintiffs' business expectancies, Plaintiffs have failed to show that Amway used improper means in soliciting and procuring business

away from Plaintiffs. Plaintiffs have urged the Court that all BSMs distributors, including Amway, are competitors in the BSMs industry. That said, as a competitor, Amway is justified to interfere with Plaintiffs' business expectancies, so long as Amway did so through lawful means. Plaintiffs have asserted the following improper means in support of their tortious interference claim: antitrust activities, including group boycott, allocation of customers, price-fixing, and monopolization; injurious falsehoods; misrepresentation; coercion; threats and intimidation; and unfair competition. (Pls.' Amended Compl. ¶ 212). As discussed above, the Court has dismissed Plaintiffs' antitrust and injurious falsehood claims; these claims thus cannot serve as bases on which to support Plaintiffs' tortious interference claims. With the remaining alleged improper means, Plaintiffs have failed to present evidence of Amway's involvement in the alleged improper conduct. Because the Court has concluded that Plaintiffs have failed to establish their alleged conspiracy involving Amway, Plaintiffs' "in for a dime, in for a dollar" theory is not applicable. Therefore, Amway cannot be held responsible for any alleged improper conduct involving the Pro Net founding members. Consequently, the Court concludes Plaintiffs have failed to present evidence sufficient to withstand summary judgment on their claims for tortious interference and civil conspiracy against Amway.

## CONCLUSION

For the foregoing reasons, Defendants' Summary Judgment Motion No. 1: Dismissing Plaintiffs' Antitrust Claims (Doc. 532) is hereby **GRANTED**, Defendants' Summary Judgment Motion No. 3: Dismissing Plaintiffs' Claims for Injurious Falsehood and Civil Conspiracy (Doc. 526) is hereby **GRANTED**, Defendants' Summary Judgment Motion No. 4: Dismissing Plaintiffs' Claims for Tortious Interference and Civil Conspiracy (Doc. 528) is hereby **GRANTED**, and Plaintiffs' Motion for Partial Summary Judgment on Count II (Doc. 534) is hereby **DENIED**.

**IT IS SO ORDERED.**

DATED: February 8, 2008

/s/ Richard E. Dorr
RICHARD E. DORR,
JUDGE
UNITED STATES
DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION**

| | | |
|---|---|---|
| **NITRO DISTRIBUTING, INC., et al.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 03-3290-CV-S-RED** |
| **v.** | ) | |
| **ALTICOR, INC., et al.,** | ) | |
| **Defendants.** | ) | |

**ORDER**

(Filed Jan. 4, 2008)

Now before the Court is Defendants' Summary Judgment Motion No. 2: Barring Netco and Schmitz & Associates' Antitrust Claims Based on Expiration of the Limitations Period (Doc. 524).

I. Factual Background

For purposes of Defendants' motion for summary judgment, the following are material, uncontroverted facts.

Plaintiffs Netco ("Netco") and Schmitz & Associates ("Schmitz Associates") operated "tools and function" businesses. Netco participated in the "tools" business, selling business support materials ("BSMs")

to Amway[1] distributors for training and motivational purposes. Schmitz Associates engaged in the "function" business, hosting seminars, rallies, and conventions for BSM customers.

Netco and Schmitz Associates claim that Pro Net members, Defendants' alleged co-conspirators, stole their BSM customers and drove them out of the BSM business. According to Netco and Schmitz Associates, these customers were stolen in the 1998-1999 time period. Schmitz Associates stopped sponsoring major functions after July 1998 because Pro Net members had allegedly succeeded in destroying its major function business by that time. In July 1999, Netco sold the portion of its business that was an Amway distributorship to Joanne Schmitz; the portion of Netco that operated the tools business was not sold because, according to Netco's owner Charlie Schmitz, "[t]here was nothing there for me to sell." As of July 1999, Netco and Schmitz Associates were aware of the alleged theft of their customers.

At the time Pro Net members were allegedly stealing BSM customers, Charlie Schmitz complained repeatedly to Defendants. Schmitz testified that Defendants refused to get involved in the tools disputes. Schmitz also testified that at least as early as May 1998, he had suspicions about Defendants' alleged support of Pro Net's activities.

---

[1] For purposes of this Order, the Court will use "Amway" to reference Defendants Amway, Quixtar, and Alticor collectively.

Netco and Schmitz Associates filed their Complaint in the instant action on August 5, 2003. In the Complaint they allege, in pertinent part, that Defendants conspired with others to violate numerous antitrust laws.

## II. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1075 (W.D. Mo. 1999). When ruling on a motion for summary judgment, the court shall view the facts in a light most favorable to the nonmoving party and allow the nonmoving party the benefit of all reasonable inferences to be drawn from the evidence. *See id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Reed v. ULS Corp.*, 178 F.3d 988, 900 (8th Cir. 1999)).

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an essential element to that party's case on which that party will bear the burden of proof. *See Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010, 1014 (W.D. Mo. 1988) (citing *Celotex Corp. v. Catrett*, 477

U.S. 317, 324 (1986)). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence in favor of the nonmoving party must be more than merely "colorable." *Id.* "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986) (footnote omitted).

## III. Discussion

Under 15 U.S.C. § 15b, any cause of action under the antitrust laws "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (2000). A cause of action accrues and the limitations period begins to run when a defendant commits an act that injures the plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). In the context of a continuing conspiracy to violate antitrust laws, as alleged here, it has "usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Id.* When a continuing conspiracy is alleged, an overt act by the defendant is required to restart the statute of limitations and the statute runs from that last overt act. *Varner v. Peterson Farms*, 371 F.3d

1011, 1019 (8th Cir. 2004). An overt act is one that (1) is new and independent and not merely a reaffirmation of a previous act, and (2) inflicts new and accumulating injury on the plaintiff. *Id.* The commission of a separate new overt act, however, does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

A. Accrual of Antitrust Cause of Action

Defendants argue Plaintiffs are time barred from asserting their antitrust claims as "whatever acts led to their alleged antitrust injury necessarily occurred before July 1999." (Defs.' Br. 5). Defendants contend the undisputed testimony confirms that the Schmitz Associates function business had been destroyed by July 1998 and the Netco tools business had been all but eliminated by July 1999. Plaintiffs claim Netco continued its tool business and Defendants continued to act in furtherance of the conspiracy against Netco after August 5, 1999.[2]

The Court finds Plaintiffs' position unconvincing. First, Netco has attempted to create issues of fact by submitting a November 20, 2007, affidavit by Charlie Schmitz. The statements in this affidavit, however, conflict with the April 14, 2004, affidavit of Charlie Schmitz and his earlier deposition testimony. For

[2] In their Suggestions in Opposition, Plaintiffs do not make a similar argument with respect to Schmitz Associates.

example, in his November affidavit, Schmitz claims Netco continued uninterrupted to provide tools to Amway IBOs well into 2003 in an attempt to rebuild its BSM business. (Pls.' Exs. Vol. XVII, C. Schmitz Aff. ¶ 13, Nov. 20, 2007). This directly contradicts his earlier testimony in which he stated that after the July 1999 sale of its Amway distributorship, Netco continued to sell "motivational materials that [were] not affiliated with Amway/Quixtar." (Pls.' Exs. Vol. XVII, C. Schmitz Aff. ¶ 14, Apr. 14, 2004). Further, in deposition testimony Schmitz testified that Netco stopped engaging in the tool business before the July 1999 sale of its Amway distributorship. (Pls.' Exs. Vol. VI, C. Schmitz Dep. 14:1-6, May 31, 2007). Indeed, Schmitz repeatedly referenced the destruction of Netco's business as of July 1999. (C. Schmitz Aff. ¶¶ 7, 11, Apr. 14, 2004; Defs.' Ex. 53, C. Schmitz Dep. 253:24-254:15, May 31, 2007). An affidavit filed by a plaintiff in opposition to a motion for summary judgment that directly contradicts the plaintiff's previous testimony is insufficient to create a genuine issue of material fact. *City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 475 (8th Cir. 2006).

Moreover, even if the Court were to accept Schmitz's most recent statements, Plaintiffs have failed to identify any overt acts after July 1999 that would allow them recovery. As stated above, an overt act must inflict a new and accumulating injury, and it is as a result of that act that Plaintiffs may recover damages. Plaintiffs' own damage expert, John O. Ward, calculated the terminal value of Netco and

Schmitz Associates as of July 1999, as by that month "their tool and function businesses had been eliminated." (Pls.' Exs. XV, J. Ward Rep. 20, June 1, 2007). Plaintiffs have not sought damages for specific acts occurring after July 1999, and Plaintiffs are barred from recovering for injuries caused by old overt acts outside the limitations period. *Klehr*, 521 U.S. at 189.

B. Fraudulent Concealment

Plaintiffs contend that despite the accrual of their antitrust claims before August 5, 1999, the record supports the reasonable inference that the statute of limitations period was tolled as a result of fraudulent concealment on the part of Defendants.

In *Kansas City, Mo. v. Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir. 1962), the court of appeals held that "the fraudulent concealment doctrine is to be read into the statute of limitations [applicable to private antitrust litigation] so that . . . the limitations period begins to run from the time that plaintiff by the exercise of reasonable diligence, discovers or should have discovered the cause of action." *Id.* at 284. To establish fraudulent concealment and toll the four-year statute of limitations, Plaintiffs must demonstrate: "(1) Defendants' concealment of Plaintiffs' cause of action, (2) failure by Plaintiffs to discover the existence of their cause of action, and (3) due diligence by Plaintiffs in attempting to discover the claim." *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1022 (D. Minn. 1997).

Plaintiffs have failed to make a showing sufficient to establish the existence of fraudulent concealment. Plaintiffs have presented no evidence of conduct on the part of Defendants to fraudulently conceal their cause of action. To the contrary, Schmitz testified that he knew Amway was continually refusing to enforce its rules against the Pro Net members despite his repeated complaints. (C. Schmitz Aff. ¶ 5, Nov. 20, 2007). Furthermore, while Plaintiffs claim Charlie Schmitz did not begin to understand Defendants' role in relation to the wrongdoing of the Pro Net members until after the suit was filed against the Pro Net members in 2000, Schmitz testified that he "knew early on," as early as May 1998, that Amway had somehow orchestrated or supported the activities of Pro Net. (Pls.' Exs. Vol. VI, C. Schmitz Dep. 92:1-93:18, May 31, 2007). Finally, Plaintiffs have offered no evidence that they were diligent in investigating Amway's alleged involvement in the Pro Net activities. Consequently, the doctrine of fraudulent concealment has no application in the context of Netco and Schmitz Associates's antitrust claims.

## III. Conclusion

For the foregoing reasons, Defendants' Summary Judgment Motion No. 2: Barring Netco and Schmitz & Associates' Antitrust Claims Based on Expiration of the Limitations Period (Doc. 524) is hereby **GRANTED**. The antitrust claims asserted by Plaintiffs Netco and Schmitz & Associates in Counts I-IV of

the First Amended Complaint (Doc. 242) are hereby **DISMISSED with prejudice**.

**IT IS SO ORDERED.**

DATED: January 4, 2008

*/s/ Richard E. Dorr*
RICHARD E. DORR,
JUDGE
UNITED STATES
DISTRICT COURT

453 F.3d 995

United States Court of Appeals,
Eighth Circuit.

**NITRO** DISTRIBUTING, INC.; West Palm Convention Services, Inc.; Netco, Inc.; Schmitz & Associates, Inc.; U-Can-II, Inc., Plaintiffs-Appellees,

v.

**ALTICOR**, INC., a foreign corporation; Amway Corporation, a foreign corporation; Quixtar, Inc., a foreign corporation, Defendants-Appellants.

**No. 05-3686.**

Submitted: May 15, 2006.
Filed: July 11, 2006.

Thomas C. Walsh, argued, St. Louis, Missouri (James R. Sobieraj and Timothy Q. Delaney, Chicago, Illinois, on the brief), for appellant.

R. Dan Boulware, argued, St. Joseph, Missouri (Todd H. Bartels and R. Todd Ehlert, St. Joseph, Missouri, on the brief), for appellee.

Before WOLLMAN, BRIGHT, and RILEY, Circuit Judges.

BRIGHT, Circuit Judge.

Alticor, Inc., Amway Corporation, and Quixtar, Inc. (collectively "Amway") appeal the district court's[1] order denying their Motion to Dismiss, or in the Alternative, to Stay the Case and Compel Arbitration.

---

[1] The Honorable Richard E. Dorr, United States District Judge for the Western District of Missouri.

On appeal, they argue (1) the district court erred in determining that Amway's arbitration agreement does not bind the plaintiffs, and (2) the district court erred in determining that the arbitration agreement was procedurally and substantively unconscionable. We affirm the district court on the first point on appeal and do not reach the second point.

*Background*

The five plaintiffs in this case are motivational tools businesses associated with the Amway trade. Amway, a multinational company with sales in excess of $5 billion, sells a wide variety of products ranging from kitchen cleaner to jewelry to, in some countries, coffee and milk. Because Amway has a unique business model, an overview of its practices helps understand this case. Amway distributes its products via a "network marketing" method. Under this method, a potential distributor must be sponsored into the company before he or she may sell Amway products. The sponsor, the sponsor's sponsor, and so on, are the "upline" for the new distributor. Amway encourages distributors to establish a "downline" by sponsoring other distributors, and it awards bonuses based on the volume of both the distributors' sales and the sales of their downline. Amway calls this system the "products business".

Sponsors use motivational tools like tapes, lectures, and rallies to recruit new distributors and to encourage their downlines to sell as many products as

possible. The "tools business" arose to meet the demand for motivational tools. Amway's rules prohibit a distributor from also operating a motivational tools business, which would compete with Amway's own tools business. Distributors therefore create separate entities to run these businesses.

The plaintiffs in this case are tools businesses, each of which is owned by a distributor who also operates an Amway products business. With the exception of Netco, none of the tools businesses has ever signed an arbitration agreement with Amway, although each is owned by a distributor whose products business has signed such an agreement. Amway seeks to bind the tools businesses to the arbitration agreements signed by the products businesses.

The plaintiffs sued Amway in district court. The district court refused to enforce Amway's arbitration agreement and stayed further proceedings pending appeal. First, the district court determined that the arbitration agreements did not bind the tools businesses because the tools businesses neither signed the agreements nor acted as agents of the products businesses that did sign. Additionally, the district court determined that, even if the tools businesses were subject to the arbitration agreements, the agreements were unenforceable because they were unconscionable. The district court noted that the arbitration agreement contained a severability clause that would sever any illegal portions of the agreement without rendering the entire agreement invalid. The court stated that, if the arbitration

agreement did bind the plaintiffs, the parties would be required to find a neutral arbitrator in order for the contract to be enforceable.

Amway now appeals the district court's ruling.

*Discussion*

This court reviews de novo arbitration issues based on contract determination. *Keymer v. Management Recruiters, Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir.1999). To the extent that the district court based its order on factual findings, we review using the clearly erroneous standard. *Id.*

In its first point on appeal, Amway asserts the district court erred in determining that the arbitration agreements did not bind the plaintiffs. According to Amway, the agreements bound the plaintiffs either on the basis of estoppel, agency, or the interlocking dependency between Amway, the products businesses, and the tools businesses.

Amway first argues the plaintiffs should be bound on the basis of estoppel. Amway asserts that "a nonsignatory may be bound to an arbitration agreement (a) when it receives a direct benefit from the contract containing the arbitration provision, or (b) by maintaining its entitlement to rights or benefits under the contract." According to Amway, the plaintiffs receive a direct benefit from the contract because they benefit in general from the Amway network and because their related distributorships conduct their

business in accordance with the Amway Rules of Conduct, specifically Amway Rule 4.14.

However, benefitting in general from the Amway network is not the same as directly benefitting from the Amway Rules of Conduct. The direct benefit of an Amway distributorship agreement is the right to sell Amway products and services and to recruit others to do the same. The tools businesses perform entirely different functions. In addition, because Amway does not allow its distributors to also operate tools businesses, Amway's Rules of Conduct, including Rule 4.14, by definition apply to only those in the products business. As Amway itself stated in a letter to one of the plaintiffs, disputes involving tools businesses "do not appear to be covered by our Rules of Conduct or by [the plaintiff's] Amway distributor contract." Accordingly, any benefit the tools businesses derive from the Amway Rules is, at best, indirect and insufficient to support estoppel.

Amway also incorrectly argues that the arbitration agreement should bind the plaintiffs because the plaintiffs maintain their entitlement to rights or benefits under the Amway Rules of Conduct. The plaintiff tool companies do not assert that they are entitled to any rights or benefits under the Amway Rules. Their lawsuit does not allege any violations of that contract. In addition, as both parties admit, the Amway rules do not cover tools businesses, so the plaintiffs by definition could not benefit or derive rights from them. *Cf. Dominium Austin Partners, LLC v. Emerson,* 248 F.3d 720, 728 (8th Cir.2001)

(binding nonsignatory parties to a partnership agreement where those parties had made allegations in a class action lawsuit that treated all parties as signatories and were based in part on the partnership agreement).

Next, Amway argues that the plaintiffs are bound by the arbitration agreement because they are agents of the products businesses. An agent is subject to the same contractual provisions, including arbitration contracts, to which the principal is bound. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir.1993). Amway, however, has failed to show that the tools businesses are agents for those companies because it has not demonstrated that they had actual or apparent authority to act on behalf of the products businesses. Amway cannot plausibly assert that it reasonably believed the tools businesses had the authority of an agent when Amway's own Rules of Conduct mandate the two types of businesses remain separate and unconnected entities.

Third, Amway asserts that the plaintiffs may be compelled to arbitrate under the "community of interest" doctrine, because the interests of the plaintiffs are directly related to Amway's interests and only by ordering arbitration may evisceration of the underlying arbitration agreement be avoided. The cases Amway cites in support of this proposition, however, relate to situations where a *nonsignatory* attempts to bind a *signatory* to an arbitration agreement.

*Pritzker,* 7 F.3d 1110; *CD Partners, LLC v. Grizzle,* 424 F.3d 795 (8th Cir.2005).

In this case, the inverse is true: Amway, the signatory, is attempting to bind the nonsignatory plaintiffs to the arbitration agreement. Although Amway maintains this is a nondistinction, the Second Circuit noted in *Thomson-CSF, S.A. v. American Arbitration Ass'n* that the nature of arbitration makes the distinction important: "Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." 64 F.3d 773, 779 (2d Cir.1995). Because the plaintiffs never indicated a willingness to arbitrate with Amway, the estoppel cases cited by Amway are "inapposite and insufficient justification" for binding the plaintiffs to an agreement they never signed. *Id.; See also Keymer,* 169 F.3d at 504 ("[A]rbitration is a matter of consent, not of coercion.")

The parties disagree on whether one of the plaintiffs, Netco, actually signed Amway's arbitration agreement. Charlie and Kimberly Schmitz own Netco. In 1984, before Netco came into existence, Charlie Schmitz signed an application to become an Amway distributor. In 1985, he signed a form allowing Amway to automatically renew each year his distributorship. In 1990, Charlie and Kimberly incorporated Netco, and Netco began operating as both a distributorship and a tools business in 1991. The Netco corporate application did not contain an arbitration agreement, but it did state that Netco would comply

with the Amway Rules of Conduct. Amway automatically renewed Netco's distributorship each year, apparently based on Schmitz's 1985 automatic renewal document. In 1998, Amway unilaterally amended its Rules of Conduct to include an agreement to arbitrate. By 1999, Netco was no longer operating as either an Amway distributorship or an Amway tools business.

Under these facts, we cannot say that Netco agreed to be bound by the agreement to arbitrate. We have emphasized that arbitration is a matter of contract. *See Keymer,* 169 F.3d at 504. Netco never signed Amway's arbitration agreement. At best, it merely ratified for one year Rules of Conduct that, by Amway's own admission, applied solely to products businesses. In this lawsuit involving tools businesses, Netco is not bound by Amway's arbitration agreement.

In its second point on appeal, Amway asserts the district court erred in determining that its arbitration agreement was both procedurally and substantively unconscionable. We need not reach this argument for we hold that the plaintiffs are not bound by Amway's arbitration agreement.

Accordingly, we affirm.

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

| | | |
|---|---|---|
| **NITRO DISTRIBUTING, INC., WEST PALM CONVENTION SERVICES, INC., NETCO, INC., SCHMITZ & ASSOCIATES, INC., and U-CAN-II, INC.,** | ) | |
| **Plaintiffs,** | ) | **Case No. 03-3290-CV-W-RED** |
| **v.** | ) | |
| **ALTICOR, INC., AMWAY CORPORATION, and QUIXTAR, INC.,** | ) | |
| **Defendants.** | ) | |

## ORDER

(Filed Sep. 16, 2005)

Pending before the Court are the following: Defendants'[1] Motion to Dismiss, or in the Alternative to Stay the Case and Compel Arbitration (Doc. 11); Suggestions in Support of Motion to Dismiss Case, or in

---

[1] In the Complaint and other pleadings before the Court, the parties use the terms "Defendants" or "Amway" to collectively refer to all three entities: Amway, Alticor, and Quixtar. For the sake of clarity, "Defendants" and "Amway" shall be used interchangeably herein and shall be considered to refer to all Defendants as they appear for purposes of the pending Motion and this Order and to be one in the same.

the Alternative to Stay the Case and Compel Arbitration (Doc. 13); Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss Case, or in the Alternative to Stay the Case and Compel Arbitration (Doc. 123); Reply Suggestions to Motion to Dismiss Case, or in the Alternative to Stay the Case and Compel Arbitration (Doc. 129); Supplement Sur-Reply to Motion to Dismiss Case or in the Alternative to Stay the Case and Compel Arbitration (Doc. 138); Sur-Reply to Motion to Dismiss Case or in the Alternative to Stay the Case and Compel Arbitration (Doc. 140). The Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss Case, or in the Alternative to Stay the Case and Compel Arbitration (Doc. 123) and subsequently listed documents are filed under seal due to the Protective Order (Doc. 85) issued in this case. For the following reasons, Defendants' Motion to Dismiss Case or in the Alternative to Stay the Case and Compel Arbitration (Doc. 11) is due to be **DENIED**.

## I. Factual Background

Defendant Amway and Defendant Quixtar are members of the Defendant Alticor family of companies. Defendants are engaged in multilevel marketing. Quixtar sells similar products, but is engaged primarily in I-commerce.

Amway products are sold by distributors or Independent Business Owners ("IBOs"), the terms are interchangeable. Distributors sell Amway products

and in turn sponsor others to sell Amway products. To become an Amway distributor, one has to be sponsored into the Amway company. The sponsor, and the sponsor's sponsor, and so on, are the "upline" for the new distributor. The distributor will then sponsor others into the business, creating a "downline" as those sponsored by the distributor sponsor others, ever increasing the downline. Distributors earn performance bonuses based on the volume of their sales and the volume of the sales of their downline. This is the "products business."

Part of Amway's marketing plan involves motivation of a distributor's downline. In fact, motivation of a downline is required by Amway. However, the motivational tools to be utilized are determined by the respective distributor. Generally, motivational materials can include tapes, lectures, rallies, and other tools to encourage downline members to sell to their highest potential. This requirement for downline motivation, and the demand for more motivational tools, gave rise to the tools business ("tools business"). Amway's rules prohibit an Amway distributor from also operating a motivational tools business, therefore separate entities are created to run the tools businesses. Often, the same individual will be the principal owner of an Amway products distribution business and a separate tools business. There is an intersection of the products and the tools businesses, as it is not uncommon for the owners of an Amway product distribution business to create and sell motivational tools through a separately

owned tools business to their Amway downline distributors. Defendants also create motivational tools to sell, making them a competitor to Plaintiffs in the tools business.

Plaintiffs are involved in the tools business, either by selling motivational products, holding rallies and conventions, or both. Only one Plaintiff was ever in the products business, and that is Plaintiff Netco. Netco claims there was an approximate eight (8) year period during which Netco did not know it was supposed to separate its product distribution business from its tools business. Except for the owners of Netco, the owners of the Plaintiff companies also each own a separate entity that operates an Amway product distribution business. Netco operated as both a tools business and products business from the date of its incorporation in 1991 until 1999.

Ken Stewart is the principal owner of the tools businesses. Plaintiffs Nitro and West Palm, and Stewart's product business Stewart & Associates. Plaintiffs Netco and Schmitz & Associates are owned by Charlie and Kimberly Schmitz. Plaintiff Netco was the Schmitz's products business and also did some tools business. Schmitz & Associates has always engaged in the tools business. Schmitz & Associates engaged in functions and conventions within the tools business and Netco engaged in selling other motivational products. Plaintiff U-Can-II, a tools business, is owned by Brig and Lita Hart. The Harts also own B & L Enterprises which is an Amway distributor engaged in the products business.

## II. Background of the Pleadings

Plaintiffs' Complaint (Doc. 1) alleges six counts against Defendants. These counts include Antitrust violations by group boycott, illegal allocation of customers, illegal tying arrangement, and conspiracy to monopolize. Also the Complaint states a claim for tortuous [sic] interference with a business expectancy and civil conspiracy. All of the allegations in the Complaint concern the operation of Plaintiffs' tools businesses.

Defendants in their Motion to Dismiss, or in the Alternative to Stay the Case and Compel Arbitration, assert that the Plaintiffs are bound to mandatory arbitration in this case. Defendants claim that the underlying dispute arises under the Rules of Conduct for Amway distributors in the products business and therefore is subject to the arbitration requirements for such disputes. In addition, Defendants claim that the Plaintiffs have agreed to bind themselves to the Amway Rules of Conduct, including the arbitration provision therein, by actions of their principals in accepting renewals of their Amway distributor agreements and signing other documents relating to their Amway distributorships. Defendants further claim that some Plaintiffs signed an agreement with ProNet, a non-party company. The Defendants claim the ProNet agreement includes a provision that the parties will be bound to the Amway Rules of Conduct, including the arbitration clause.

## III. Discussion

Federal antitrust claims are arbitrable under the Federal Arbitration Act. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). The Federal Arbitration Act ("FAA") "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985). Accordingly, the Court's role under the FAA is necessarily limited to a two part determination. 9 U.S.C. § 2; *Pro Tech Indus., Inc. v. U.R.S. Corp.*, 377 F.3d 868, 871 (8th Cir. 2004). First, the Court must determine if a valid arbitration agreement exists. *Pro Tech*, 262 F.3d at 871 (citing *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680 (8th Cir. 2001)). Second, if there is a valid agreement, the Court must then determine whether the agreement encompasses the dispute between the parties. *Id.*

Under the first part of the test, the Court finds no valid agreement exists for two reasons. One, the various agreements which Defendants claim bind Plaintiffs to the Amway Rules of Conduct either were not signed by the parties to this suit, did not form valid contracts, or are not applicable to this lawsuit. Two, the portion of the arbitration agreement requiring arbitration with JAMS arbitrators is unconscionable. Having found no applicable arbitration agreement in this matter, the Court need not address the scope of the arbitration agreement.

The Court is aware of Defendants' contention that the underlying dispute in this case arises out of the Amway Rules of Conduct or violations of those rules. The actual source of part or all of the underlying complaint is not the issue on this question of arbitration. Simply stated, the plaintiffs will not be required to participate in Amway's arbitration procedure unless Plaintiffs are found to have agreed to be bound by Amway's arbitration agreement.

### A. The ProNet Agreement

As a threshold matter, the Court finds the purported agreements of Nitro, Netco, and U-Can-II with ProNet to be of limited, if any, relevance to this case. ProNet is not a party to this suit. What Defendants allege is that by signing membership agreements with ProNet, some of the Plaintiffs (specifically, Nitro, Netco, and U-Can-II) have agreed to be bound by the arbitration provision contained in the Amway Rules of Conduct. The Court finds this argument without merit for two primary reasons. One, while ProNet may have adopted the Amway Rules of Conduct, it created its own separate arbitration procedure. Therefore, the Amway arbitration provision contained within the Amway Rules of Conduct was preempted and superceded by ProNet's own separate and different arbitration procedure. One important distinction to be noted between the two provisions is that the ProNet arbitration procedure does not utilize the Amway trained JAMS arbitrators. As a result, the Amway arbitration procedure was not incorporated

into the ProNet membership agreement. Secondly, Amway is unable to enforce these agreements as a third-party beneficiary.

*i. Adoption of the Amway Rules of Conduct*

The ProNet membership application generally states that as a member, the applicant agrees to be bound by the Amway Rules of Conduct. The Amway Rules of Conduct include Amway's arbitration provision. However, ProNet specifically set forth a dispute resolution clause in the ProNet Terms and Conditions which has a distinctly different arbitration provision from the one set forth in the Amway Rules of Conduct. For example, the ProNet provision requires arbitration in accordance with the rules of the American Arbitration Association, not the Amway arbitration rules which utilize the Amway trained and selected JAMS arbitrators.

Essentially, it appears the Amway Rules of Conduct were referenced as general guidelines, however, Pro Net obviously made a decision to adopt a specific and different arbitration provision. It makes no sense that Defendants can have it both ways, i.e. that a ProNet member would be subject to both the ProNet arbitration procedure and the significantly different arbitration procedure provided for in the Amway Rules of Conduct. There is nothing in the ProNet terms and conditions or other materials that contemplates this dual possibility.

Instead, by creating their own arbitration agreement, ProNet clearly indicated that it did not intend to adopt the Amway arbitration agreement contained in the Amway Rules of Conduct. It is well established that when general and specific provisions of a contract conflict, the specific provision is generally controlling. *See* Restatement (Second) of Contracts § 203C; *see also, Maas v. Dubuque Packing Co.*, 754 F.2d 287 (8th Cir. 1985), decision clarified on denial of reh'g, 757 F.2d 194 (8th Cir. 1985) (citing text). Additionally, where the first clause is general and the later clause more specific, or if the later clause conflicts with only part of the earlier clause, the later clause may be given full effect and the earlier limited accordingly. WILLISTON ON CONTRACTS § 32:15 (4th Ed. 2004).

Applying these principles to the case at bar, it is clear that the adoption of the Amway Rules of Conduct is a general provision which is limited by the ProNet specific arbitration clause. For this reason, the Amway arbitration clause is not part of the ProNet agreement. Therefore, even if one or more of the Plaintiffs are found to be bound to the ProNet agreement, those Plaintiffs would not be bound to the Amway arbitration provision as part of the ProNet agreement.

*ii. Amway as a Third-Party Beneficiary to Enforce the ProNet Agreement*

Even if, for purposes of argument, this Court was to find that the Amway arbitration provision was part of the ProNet agreement, ProNet is not a Defendant in this suit and, therefore, the Defendants still could not use the ProNet contract to compel arbitration as Defendants are not third party beneficiaries. The requirements to be a third party beneficiary are similar in most jurisdictions including Michigan, Missouri, and Florida. Defendants cite to a Michigan statute, M.C.L.A. 600.1405 which states that a person "for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him. . . ." The statute further clarifies that a promise is made "for the benefit of a person" when the promisor has undertaken to give or to do or refrain from doing something directly to or for the third person." *Id.*

Missouri law is similar, recognizing there are three types of third-party beneficiaries to a contract: donee beneficiaries, creditor beneficiaries, and incidental beneficiaries. "A donee beneficiary is one upon whom the promisee intends to confer the benefit of performance of the contract although such performance will not discharge a preexisting duty or obligation to the beneficiary." A creditor beneficiary is "one upon whom the promisee intends to confer the benefit of the performance of the contract and thereby discharge an obligation or duty the promisee owes the

beneficiary." An incidental beneficiary is one "who will be benefitted by performance of a promise but who is neither a promisee nor an intended beneficiary." Only donee and creditor beneficiaries have enforceable rights under a contract. *OFW Corp. v. City of Columbia,* 893 S.W.2d 876, 879 (Mo.App. W.D.1995); cited in *State ex rel. E.A. Martin Machinery Co. v. Line One, Inc.,* 111 S.W.3d 924, 930-31 (Mo. App. 2003).

Florida law also holds a similar view of third party beneficiaries, upholding the distinction with regard to incidental beneficiaries. "A non-party is the specifically intended beneficiary only if the contract clearly expresses an intent to primarily and directly benefit the third party or a class of persons to which that party belongs. To find the requisite intent, it must be established that the parties to the contract actually and expressly intended to benefit the third party; it is not sufficient to show only that one of the contracting parties unilaterally intended some benefit to the third party." (internal citations omitted) *Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc.*, 903 So.2d 251, 254 (Fla. App. 3 Dist. 2005).

Under any of the states' schemes, Nitro, U-Can-II, Netco and ProNet would have had to intend to benefit the Defendants in some way when they created the membership agreement for the Defendants to now enforce that agreement. Defendants cite *Cochran v. Ernst and Young,* 758 F. Supp. 1548, 1558 (E.D. Mich. 1991). In *Cochran,* the parties to the

contract agreed that they would not sue a third party. The court held that this contract was clearly to benefit the third party because it gave indemnity, and therefore, the third party was a beneficiary of the contract.

The ProNet contract was not to benefit Defendants, but to benefit the individual businesses that comprised the members and founders of ProNet. The only reference to Defendants is the reference to the Amway Rules of Conduct. In the absence of any other involvement or consideration of Defendants, the adoption of the Amway Rules of Conduct did not confer a benefit on Amway, but rather merely served to adopt those rules as a model to be followed. The Pro Net membership application states the purpose is to "promote the common business interests of members engaged in distribution of Amway products." Amway is not a member of Pro Net. Further, the listed benefits of membership are specifically only available to the members.

The nature of the ProNet business is to provide motivational materials and tools. While it may be said that Amway could receive a benefit in increased sales by any successful motivational efforts of ProNet members with product distributors, this benefit to Amway is merely incidental. The stated purpose and intent of the ProNet organization is to benefit the independently owned and operated tools businesses that are the members and founders of ProNet. Accordingly, none of Defendants are third party beneficiaries to the contract and Defendants as claimed

third party beneficiaries cannot now attempt to enforce it. The Court is not deciding the validity of the agreement between ProNet and Nitro, Netco, or U-Can-II. The Court merely finds, as a preliminary matter, the Defendants in this action have no standing to enforce that agreement, assuming the agreement adopted the Amway arbitration procedure and was binding on Plaintiffs in the first place. It is also noted that for Defendants to claim they are third party beneficiaries of the ProNet agreement would be totally contrary to Defendants' stated position of being absolutely separated from the tools business. The desire of Defendants to maintain a separation between Defendants' distribution business and the Plaintiffs' tools businesses is discussed later in this Order.

Nitro, Netco, and U-Can-II have also raised an issue regarding whether they are even bound by the ProNet agreement. These Plaintiffs argue that they were not eligible for membership and that their applications for membership were never accepted by ProNet. All of this may be true. This Court has simply assumed for purposes of the above discussion that said Plaintiffs were bound by the ProNet Agreement and for the reasons stated finds that Defendants are not able to compel arbitration on the basis of the ProNet Agreement. Obviously if Plaintiffs were never members of ProNet and, therefore, not bound by the ProNet membership agreement, it would be another reason why Defendants would have no claim for arbitration via the ProNet Membership Agreement.

### B. Validity of the Amway Arbitration Agreement

Arbitration is only a matter of contract, and a "party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *AT&T Tech., Inc. v. Comm. Workers*, 475 U.S. 643, 648 (1986). Plainly stated, arbitration is a matter of "consent not coercion." *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002). In this case, Defendants claim different agreements bind distinct Plaintiffs to arbitration therefore each Plaintiff will be discussed separately.

Agreements relied upon by Defendants include application forms for the products business, and the "automatic renewal" forms for the products business which include not only an annual distributorship renewal, but an agreement to be bound by Amway's rules as they are "set out from time to time." In 1998, one of the new rules "set out" was the arbitration provision at issue in this dispute. The agreements also include the Acknowledgment of Distributor Changes form and the Add the Quixtar Business form. None of the Plaintiffs or persons purporting to act on their behalf actually signed any of these forms. Some of the previously mentioned forms were signed by owners of product businesses (distributors) who also happened to be owners of the Plaintiffs (tools businesses). Defendants use an agency theory to argue that the non-signatory Plaintiffs are bound to these forms.

Although Defendants now have a Business Support Materials Arbitration Agreement ("BSMAA") which specifically mentions arbitration for tool business disputes, none of the Plaintiffs or their owners have signed a BSMAA. Therefore, the arbitration provision found in the Amway Rules of Conduct is the only arbitration provision at issue.

The Court must first determine if any Plaintiff is bound to the arbitration provisions in the Amway Rules of Conduct through theories of agency or by signing in its own capacity. The Court finds that Plaintiffs are not so bound. The second issue is if the arbitration agreement mandating an Amway procedure that includes Amway trained and selected JAMS arbitrators is unconscionable. The Court finds that the arbitration agreement, to the extent that arbitration before Amway trained and selected JAMS arbitrators is mandatory, is unconscionable.

*i. Signatories to the Agreements to Arbitrate Under the Amway Rules of Conduct*

a. Nitro Distributing, Inc.

Nitro Distributing Inc. ("Nitro") is a Missouri Corporation based in Springfield, Missouri and is in the tool business as described above. Ken and Donna Stewart created Nitro, as well as West Palm Convention Services, Inc. ("West Palm"), and Stewart & Associates. Stewart & Associates is the Stewart's Amway products distribution business, and West

Palm (discussed *infra*) is engaged in the tool business like Nitro.

Nitro does not operate an Amway products business and likewise never signed an application to be a distributor for the products business nor any form for the automatic renewal of the products business. Ken Stewart, as President of Stewart & Associates, signed the automatic renewal form on behalf of Stewart & Associates, his Amway products business, and likewise signed an Acknowledgment of Distributorship Changes form, which included the arbitration agreement. Nitro can only be bound to the Stewart & Associates agreements under a theory of agency, as none were directly signed by Nitro.

Defendants allege that Stewart was acting as an agent for Nitro when he signed the Agreement for Automatic Renewal for Stewart & Associates and when he signed the Distributor Changes form. Under this theory, Defendants assert Nitro should be considered to have signed the agreement since Stewart signed it. To be an agent of Nitro, Stewart must have actual or apparent authority to be signing in his Nitro capacity.

"A corporate officer's actual authority derives, on the one hand, from statute or from the articles and by-laws of the corporation, or on the other hand from the officer's exercise of functions on behalf of the corporation, long tacitly acquiesced in by the board of directors." *Gaar v. Gaar's Inc.*, 994 S.W.2d 612, 617 (Mo.App.1999) (*citing Parks v. Midland Ford Tractor*

*Co.*, 416 S.W.2d 22, 26 (Mo.App.1967)). In contrast, apparent authority comes into existence by the corporation's creation of an appearance of affairs which would cause a reasonable person to believe that the officer had actual authority to do a particular act, upon which appearance a third person relies. *Holtmeier v. Dayani*, 862 S.W.2d 391, 401 (Mo. App.1993), *cited in Rice v. Bol*, 116 S.W.3d 599, 608-09 (Mo. App. 2003). Actual authority looks to the relationship of the corporation to its purported agent, while apparent authority looks to the relationship of the agent to a third party.

There can be no argument of actual or apparent authority for Stewart to bind Nitro by either the signed Distribution Authorization or the Automatic Renewal form. The Authorization and Automatic Renewal forms were both signed in 1985, but Nitro was not incorporated until 1988. Therefore, Stewart could not have received actual authority from an entity that did not exist and there could be no apparent authority because a reasonable person could not have believed Stewart was signing on behalf of an entity that did not exist.

The Acknowledgment of Distributor Changes form was signed in 1997, after Nitro came into existence. However, Defendants still cannot show actual authority or apparent authority for Stewart to have been acting as a Nitro agent when he signed the Acknowledgment on behalf of his Amway Distributorship, i.e. Stewart & Associates. The Defendants' assertion of actual authority is based on the close

relation between the tools businesses and the products businesses. Defendants assert that Stewart appeared in Nitro functions in his capacity as a Stewart & Associates distributor. There is no question that the nature of Defendants' business causes a muddling of the respective roles of the principles who own both a distribution/products business and a tools business. There is one thing for certain, however, and that is that nobody understood the respective roles and the separation to be kept between them better than Defendants.

Defendants also mention letters written to Amway from Stewart alleging harm to his tools business. The letters written to Amway occurred after the Distributor Changes form was signed and, thus, could not have given actual authority at an earlier time. The letters do raise another factor to consider on this issue. Amway's response to Stewart's letters, written in his capacity as president of his tools business, and regarding a lawsuit filed in Greene County, Missouri, was to state that "it was not clear" whether Nitro or West Palm "are required to resolve their claims in accordance with the Quixtar Rules of Conduct." This statement stands in stark contrast to the Defendants' position in the case at bar.

Moreover, as to apparent authority, no reasonable person would believe Stewart was acting on behalf of Nitro, a tools business, when he signed the form (prepared by Amway) for Stewart & Associates to agree to Distributor Changes. The form is for changes to the product business distribution, as noted in its

title. The arbitration provision itself mentions that it covers "my Amway distributorship." Stewart's Amway distributorship is Stewart & Associates. It is illogical to conclude that Stewart by signing this form as President of Stewart & Associates (his product business) was somehow obligating Nitro (his separate tool business), to the arbitration provision. Indeed, the mailing address from Defendants supports this conclusion as it was sent to Stewart & Associates, the products business.

Defendants have been very specific about requiring separate entities for the products businesses and tools businesses and cannot now assert they reasonably were confused and thought Stewart was acting on behalf of his tool business when he, at Defendants' request, was acting on behalf of his products business. By Defendant's own rules, Stewart & Associates could not operate a tools business. It would have been contrary to Defendants' own rules of separation for Stewart to adopt the arbitration agreement on behalf of Nitro by signing the form for changes to his distribution agreement, on behalf of Stewart & Associates. The form is clearly drafted by Amway for the products business and the only reasonable inference is that Amway expected Stewart to be signing on behalf of his products business alone. Amway clearly had an understanding that Stewart was signing on behalf of Stewart & Associates when he signed the form. Nitro is not bound by the Acknowledgment of Distributor Changes Form signed by Stewart on behalf of Stewart & Associates.

b. West Palm Convention Services, Inc.

West Palm was likewise created by Ken Stewart. The analysis above regarding Nitro is equally applicable to West Palm. West Palm was created in 1996. Therefore only the Acknowledgment of Distributor Changes Form was signed by Stewart after West Palm was created. Any agreements prior to the creation of West Palm cannot establish apparent or actual authority for the same reasons articulated in the Nitro analysis, *supra*. The Acknowledgment of Distributor Changes Form likewise does not bind West Palm for the same reasons Nitro was not bound, i.e., the form was created for the Amway distributor, not the tools business. Stewart clearly signed the form on behalf of his products business, and therefore did not bind West Palm to the arbitration provision contained in the form.

c. Netco, Inc.

Charlie and Kimberley Schmitz are the officers, directors, and shareholders of Netco, Inc. ("Netco"). Netco was incorporated in 1990. In 1991 the Schmitzes transferred their Amway products business to the Netco corporation. The Schmitzes also operated a tools business from the same entity. Before Netco was created, Charlie Schmitz operated an individually owned Amway distributorship. In 1985 he signed the Automatic Renewal for this distributorship in his individual capacity. The Netco corporate application to take over the distributorship

contained no arbitration agreement, but did state that Netco would comply with the Amway Rules of Conduct, as they were set out from time to time. However, at that time (1990), the Amway Rules of Conduct did not contain an arbitration provision. Netco never signed an authorization for automatic renewal of its distribution component, but Defendants continued to automatically renew the distributorship apparently pursuant to Charlie Schmitz's individual automatic renewal that was signed in 1985.

Netco never challenged the automatic renewal of its Amway distributorship. It is obvious Netco received benefits to its Amway distributorship because of the renewal. Therefore, Netco could be argued to have ratified the agreement and, in doing so, agreed to comply with the Amway Rules of Conduct, particularly in regard to conflicts related to the distribution business. The further argument is that Netco likewise is bound for conflicts related to its tools business.

This logic raises a question in the case of Netco because Netco was operating both a products distribution business and a tools business. One can understand that if you accept the benefit of a renewal of your distribution business, you also accept the rules and regulations that attach to that business. Therefore, issues related to your distribution business should be resolved in accordance with the applicable rules. This logic does not carry over to matters in dispute related to your tools business, particularly

since Amway insisted on maintaining a separation between the two types of businesses.

The Amway rules required the products and tools businesses to be kept separate. Netco should have split its business into two separate entities. The record includes several demonstrations of Defendants' insistence in refusing to address tools business disputes through the Rules of Conduct. The reason given for said refusal was Amway's position that Amway was in the products business, and acted as a competitor in the tools business, and could not, therefore get involved in disputes or requests for assistance from tools businesses. Amway does not get to have it both ways. Based on the separation Amway has insisted on between the tools businesses and the products businesses, Amway cannot now claim that somehow a tools business dispute is bound by the Amway arbitration requirement in the Amway Rules of Conduct.

d. Schmitz & Associates, Inc.

Schmitz & Associates is also owned by Charlie and Kimberly Schmitz. In contrast to Netco, Schmitz & Associates never operated in the Amway products business. Instead, it was solely formed for the tools and function business, organizing and facilitating seminars and conventions. Schmitz & Associates was formed in 1992. Schmitz & Associates never signed an Automatic Renewal Form or any other form agreeing to arbitration, it did not engage in any conduct that

could be argued to be a ratification of forms signed by Charlie Schmitz individually. Schmitz & Associates was created after the Schmitzes signed the Automatic Renewal and Product business application forms. In accordance with the analysis in regard to Nitro, *supra,* no actual or apparent authority can be found to bind Schmitz & Associates to the Amway Arbitration provision.

e. U-Can-II, Inc.

U-Can-II is a Florida corporation. It was established by John "Brig" Hart and Lita Hart in 1989. The Harts also own B & L Enterprises, Inc., formed in 1989. B & L is the Hart's Amway products distribution business, U-Can-II is the Hart's tools business. The analysis for U-Can-II is similar to the analysis for Nitro, *supra.* The Hart's agreement to join the product distribution business was made in 1978, years before the tools business was even created. Likewise, the automatic renewal form was signed in 1985, also still before their tools business was created. Therefore, there is little question as to the capacity the Harts signed those forms, and no actual or apparent authority can be established as resulting therefrom. Indeed, the Harts signed the renewal form while still a general partnership, before incorporating as B & L. U-Can-II never signed these various forms, and under the principles of agency described *supra,* cannot be bound to any obligations set forth in the forms.

Similar to Ken Stewart, Defendants also sent a letter to counsel for Brig Hart responding to correspondence between the Harts and the Defendants regarding disputes related to the Hart's tools business. In the letter, Amway was clear in saying that "we remain puzzled as to why you believe that Amway has the legal responsibility to resolve these private disputes, which do not appear to be covered by our Rules of Conduct or by Mr. Hart's Amway distributorship contract." This illustrates that there was no confusion on the Defendants' part. Defendants did not want to acknowledge any legal relationship or status with the tools businesses. When asked to get involved with the tools businesses Defendants refused. It is disingenuous for Defendants to claim in their arguments herein that somehow the tools businesses, despite Defendants' best efforts to keep them separate, are now contractually bound to Defendants' arbitration procedure. Defendants' claims are even more unlikely in consideration of the fact that Defendants' proof is all by inference originating from actions of distributors in regard to their distribution businesses. Again, not one of the plaintiffs is alleged to have actually signed an agreement to be so bound.

*ii. Unconscionability of the Arbitration Provision*

The Court also finds that any agreement of plaintiffs to arbitrate under the Amway Rules of Conduct is not valid for a second reason – unconscionability. Generally, when deciding whether an

arbitration provision is unconscionable, courts apply ordinary state-law principles governing the formation of contracts. *First Options of Chicago v. Kaplan,* 514 U.S. 938, 944; *see also* 9 U.S.C. § 2 (stating agreements are valid unless grounds "exist at law or in equity for the revocation of any contract.") The parties dispute which state's law should apply in this case.

Plaintiffs contend that they did not sign the arbitration agreement, and therefore the choice of law provision in that agreement (Michigan law) does not apply. However, the Defendants disagree and assert Michigan law is the correct law to apply in this case. For the purposes of this motion, the Court will assume that Michigan law is the correct law to apply to an unconscionability determination of the agreement. Since the Court sits to determine if there is a valid arbitration agreement, it is necessarily looking at the terms of that agreement. As the agreement in question before the Court is one requiring Michigan law, the Court will look at the unconscionability standard of Michigan.[2]

---

[2] Plaintiff contends that Missouri and Florida law, as well as Michigan law could be applicable. The standards in these states are all quite similar, and the choice of one over another is more a matter of form over substance.

Florida also follows the distinction of procedural and substantive unconscionablity. A question of no meaningful choice by the parties in the agreement is a procedural unconscionability matter, while onerous specific terms from which a party seeks relief are a substantive matter – such as terms which are

(Continued on following page)

In Michigan, the examination of a contract for unconscionability involves inquiries for both procedural and substantive unconscionability. *Hubscher & Son, Inc v. Storey*, 578 N.W.2d 701 (Mich. Ct. App. 1998). "Accordingly, there is a two-prong test to determine unconscionability: (1) What is the relative bargaining power of the parties, their relative economic strengths, the alternative sources of supply, in a word, what are their options?; [and] (2) Is the challenged tern substantively unreasonable?" *Id.* at 703. The former inquiry relates to procedural unconscionability and the latter to substantive unconscionability. However, "[r]easonableness is the primary consideration in determining whether a contract clause is enforceable." *Rehmann Robson & Co.*, 187 Mich. App. at 44, quoted in *Pack v. Damon Corp.* 320 F. Supp.2d 545, 556 (E.D. Mich. 2004). Under a

---

unreasonable and unfair. Florida law so closely parallels the Michigan scheme that Florida in *Kohl v. Bay Club Colony Condominium, Inc.*, 398 So.2d 865, 868 (1981) (citing *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich.1967), adopted the reasoning of a Michigan case in determining procedural unconscionability.

The Missouri standard for unconscionability is also quite similar. In *Funding Systems Leasing Corporation v. King Louie International, Inc.*, 597 S.W.2d 624 (Mo.App.1979), unconscionable was found to have application to both the "substantive" or "procedural" aspects of a transaction. *Id.* at 634. Substantive unconscionability refers to undue harshness in the contract terms themselves, whereas procedural unconscionable involves examination of the contract formation process, centering on the pressure exerted by the parties, the fine print of the contract, misrepresentation, or unequal bargaining position. *Id.* at 634.

federal policy favoring arbitration, arbitration agreements are to be enforced unless a party can show that it will not be able to vindicate its rights in the arbitral forum. *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004).

a. Procedural Unconscionability

The first question under the Michigan dynamic is with regard to procedural unconscionability. The most important factors in deciding procedural unconscionability are: (1) whether the economically weaker party had an alternative source with which it could contract, and; (2) whether the contract term was in fact negotiated. *Pack,* 320 F. Supp.2d at 556 (quoting *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 322 (6th Cir.1998)). While disparity of bargaining power is not enough to invalidate an arbitration provision, it does call for careful scrutiny of the provisions. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). "Where a contract is prepared by one party and offered for rejection or acceptance without opportunity for bargaining under circumstances in which the party cannot obtain the desired product or service except by acquiescing in the form agreement, Michigan courts will conclude that the contract is adhesive and therefore procedurally unconscionable." *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087, 1100 (W.D. Mich. 2000).

In this case, the Amway arbitration provision was offered in a "take it or leave it" manner. The

hallmark of "unequal bargaining position" is clear – to continue to be an Amway distributor, the agreement must be accepted. While Defendants contend that distributors had ample time to review the arbitration provisions before renewing or allowing the automatic renewal to occur, they do not refute that the arbitration provisions were given in a manner that required the distributors to accept the arbitration agreement as written or to quit the business all together. There was no other entity with which Plaintiffs could contract to participate in a similar business.

Moreover, negotiation of the arbitration clause was unheard of. Defendants admit that a distributor could not sign the distribution agreement without the arbitration provision. Defendants' position is that there was only one contract with all of its distributors.

To answer the question posed by the Michigan court as to what options are available, for the Plaintiffs in this case, the answer is very simple, there were no options. Although the renewals were automatic, i.e., no new agreement signed, it is undisputed that if the issue had been discussed, Amway would have insisted that the arbitration provision remain in place as written. The Defendants' business is in a sense exclusive, once the distributors had built up their business of selling products, they needed to annually renew their agreement with Defendants to keep the business going. This set up is not one where there are several competitors in the marketplace and

distributors could go get products from another seller to continue their business. The Defendants also made it clear that the arbitration provision was non-negotiable, and had to be included. It is important to keep in mind that Plaintiffs in this case are tools businesses who happen to have ownerships that have a related Amway distribution business. The above discussion concerns the procedural unconscionability based on the "take it or leave it" option presented to Amway distributors. The Plaintiff tools businesses are one step removed from this procedure as their involvement is vicarious at best. Thus, if Plaintiffs were held to be bound by Amway's arbitration agreement, it would be the result of a procedure where Plaintiffs never had a choice. Accordingly, the arbitration requirement is procedurally unconscionable.

b. Substantive Unconscionability

Even if a contract is procedurally unconscionable, however, "the challenged term is still enforceable if substantively reasonable and not oppressive or unconscionable." *Lozada*, 91 F. Supp.2d at 1102 (quoting *Andersons*, 166 F.3d at 323). The key to substantive unconscionability is that the terms in question are unreasonable and unfair. *Pack*, 320 F. Supp. 2d at 556 (noting substantive unconscionability asks whether the term is substantively reasonable).

In *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 225 (Mich.App. 1999), the Michigan

Court of Appeals carefully evaluated Supreme Court precedent and what standards were required to determine whether an arbitration agreement was sufficiently procedurally fair to permit vindication of statutory rights. The Court held that "to be valid, a pre-dispute agreement to arbitrate must not waive rights under the statute and must be fair." *Id.* at 227. The *Rembert* Court further held that to be fair under this definition, the agreement must contain the following minimal procedural protections: (1) clear notice, (2) right to counsel, (3) reasonable discovery, (4) a fair hearing, and (5) a neutral arbitrator. *See id.* at 228. An arbitration agreement which waived statutory rights or remedies or failed to meet these requirements of procedural fairness was not substantively reasonable and therefore not conscionable. *Id.* at 226 n. 28.

Plaintiffs in this case have raised grave doubts as to the fairness of the hearing they would receive if in arbitration with JAMS and the neutrality of the arbitrators that would be chosen. Mainly, Plaintiffs oppose the selection of the arbitrators by Defendants and the training Defendants provide to the arbitrators. Plaintiffs have submitted videos and DVD's of Defendants' training sessions with the arbitrators and these exhibits show Defendants counseling the arbitrators on the nature of their business. It is this Court's opinion that the procedure utilized by Defendants to screen, train and ultimately hand-pick their panel of arbitrators does not come close to passing

any reasonable test of fairness and neutrality required for a legitimate arbitration proceeding.

Amway's "training" covered a two day period and then a third day of "interviews." The training covered subjects including profiles of the people who started and now run Amway, the benevolent and independent culture of Amway, procedures to the utilized in arbitration, and a summary of various complaints the arbitrators could anticipate. The arbitrator candidates even participated in some "role playing" as successful Amway distributors. Also included throughout the two days were assurances that Amway was not a pyramid scheme and that the business was legitimate. Defendants claim, however, that the training was not out of the ordinary nor improper as the panel was not specifically told how to resolve possible issues they would see. On the videos, the Defendants state they will not discuss the meaning of the Rules of Conduct that are not absolutely "black and white."

It was most interesting that the issue presently before this court was included in a particular "training" discussion at one point, complete with diagrams from Defendants' counsel regarding what was appropriate and inappropriate in the scenario. The videos run almost ten (10) hours, but suffice it to say that it appears clear to this court that the training atmosphere and content of the discussions was designed to produce a very favorable view of Defendants. Coupled with the training session was the selection process being utilized by Defendants, both to select its initial group for training, then after personal interviews, to

pick the final panel of arbitrators from which all arbitrators for Amway disputes would be chosen.

While there can be basic education of arbitrators regarding specialized subject matter, there is a point where basic education can be extended to subtle manipulation on issues which could be expected to be considered by the arbitrators. This limit has been passed by Amway's preparation of the arbitrators at JAMS. While JAMS may be a respected organization, the Defendants have called the neutrality of this particular arbitration arrangement into question. Also telling is the fact that Defendants have never lost in arbitration, with the exception of a few counterclaims. The record shows that when Defendants are defending in arbitration, the process takes much longer than when they are the Plaintiffs in arbitration, and longer than JAMS arbitrations in general. Michigan law also requires reasonable discovery in arbitration agreements to avoid a finding of unconscionability. In the Amway agreement, discovery is not guaranteed, instead it is for the arbitrator to choose if discovery should be allowed.

Defendants are choosing the arbitrators in a hand-picked selection process, training them, and then requiring the arbitration process with no exceptions. Other courts have found the hand-picking of arbitrators to be a significant factor in determining unconscionability. *See Hooters of America v. Phillips*, 39 F. Supp.2d 582 (S.C. 1998) (finding the "Hooters arbitration scheme fails miserably to satisfy even the most basic requirements of a commercially

reasonable arbitration scheme" and is a "spectacle of *Gilmer* gone mad.") When the *Hooters* case was taken on Appeal to the Fourth Circuit, the Court noted that the arbitration scheme was one where the company had "unrestricted control" over the panel of arbitrators. *Hooters v. Phillips,* 173 F.3d 933, 939 (4th Cir. 1999). Similar to the Amway system, the employees and employer could each choose an arbitrator, but they could only choose from a selected list, created and maintained by the employer. *Id.* While the arbitration agreement at issue in *Hooters* involved other evidence of unconscionability not before the Court in the Case at bar, it is important to note that experts in the *Hooters* case found that the "'most serious flaw' was that the 'mechanism [for selecting arbitrators] violates the most fundamental aspect of justice, namely an impartial decision maker.'" *Id.* Like the arbitration provision in *Hooters,* the Amway system undermines the neutrality of the proceedings. While the parties are allowed to choose their own arbitrators, the pool of candidates for this choice is limited by Defendants to those arbitrators whom Defendants have already pre-selected in a process that involves an initial screening, then training with a heavy dose of goodwill for Defendants and their manner of operation, then after personal interviews, being hand-picked to be on the list of arbitrators (so long as Defendants deem them to be acceptable). Arbitrators are to be neutral, and allowing such training and influence over the arbitrators as Defendants have in this situation is both unreasonable and unfair.

Although this court has found that none of the Plaintiffs have submitted to arbitration, the court also finds that, in the alternative, arbitration with pre-selected JAMS arbitrators as presently set up by Defendants is unconscionable. The Court is aware of Rule 11.5 in the Defendants' arbitration rules which states in part that "[i]f any rule or part thereof is found to be invalid by a court of competent jurisdiction, there rules will be interpreted as through [sic] the invalid portion were not part of these rules." Therefore, if any Plaintiff was found to be bound to Am-way's arbitration procedure it would not include the requirement to utilize the current procedure requiring JAMS arbitration. Given the Court's previous discussion regarding the applicability of the arbitration provision to each of the Plaintiffs, the Court does not find it necessary to send any of the Plaintiffs to arbitration.

## IV. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss, or in the Alternative, Stay the Case and Compel Arbitration is hereby **DENIED**.

**IT IS SO ORDERED.**

DATED: September 16, 2005

/s/ Richard E. Dorr
RICHARD E. DORR,
JUDGE
UNITED STATES
DISTRICT COURT

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No: 08-1451

Nitro Distributing, Inc., et al.,

Appellants

v.

Alticor, Inc. a foreign corporation, et al.,

Appellees

---

Appeal from U.S. District Court
for the Western District of Missouri – Springfield
(6:03-cv-03290-RED)

---

**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 15, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**15 USCA § 1. Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

---

**15 USCA § 2. Monopolizing trade a felony; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

---

**15 USCA § 15. Suits by persons injured**

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if –

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

**(C)** such foreign state engages primarily in commercial activities; and

**(D)** such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section –

**(1)** the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

**(2)** the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

**USCA CONST. Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 09-524

Supreme Court, U.S.
FILED

In The

# Supreme Court of the United States

NITRO DISTRIBUTING, INC., et al.,

*Petitioners,*

v.

ALTICOR INC., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION

JAMES R. SOBIERAJ
*Counsel of Record*
CYNTHIA A. HOMAN
RALPH J. GABRIC
JULIE L. LEICHTMAN
BRINKS HOFER GILSON & LIONE
NBC Tower – Suite 3600
455 North Cityfront Plaza Drive
Chicago, Illinois 60611
(312) 321-4200

December 2, 2009

*Counsel for Respondents*

## QUESTIONS PRESENTED

1. Whether summary judgment is properly granted under *Matsushita* when, as here, an antitrust claimant lacks both: (a) direct evidence of an accused's participation in an alleged antitrust conspiracy, and (b) circumstantial evidence of an accused's participation in an alleged antitrust conspiracy tending to exclude the possibility that the accused acted independently, a question as to which the courts of appeals are not in conflict.

2. Whether summary judgment is properly granted when, as here, an antitrust claimant asserting solely *per se* violations did not come forward with evidence raising a genuine dispute regarding whether the accused operated at the same level of the market as its alleged co-conspirators.

## LIST OF PARTIES

The petitioners are: Nitro Distributing, Inc.; West Palm Convention Services, Inc.; Netco, Inc.; Schmitz & Associates, Inc.; and U-Can-II, Inc.

Until September 2008, the respondents were: Alticor Inc.; Amway Corporation; and Quixtar Inc. On September 1, 2008, respondent Amway Corporation became known as Amway International Inc., and respondent Quixtar Inc. became known as Amway Corp.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Solstice Holdings Inc. is the parent company of respondent Alticor Inc. and owns 100 percent of its stock. No publicly held corporation owns 10 percent or more of Alticor Inc.'s stock.

Respondent Alticor Inc. is the parent company of respondent Amway International Inc., which before September 1, 2008 was known as Amway Corporation. No publicly held corporation owns 10 percent or more of Amway International Inc.'s stock.

Alticor Corporate Enterprises Inc. is the parent company of respondent Amway Corp., which before September 1, 2008 was known as Quixtar Inc. Alticor Corporate Enterprises owns 100 percent of Amway Corp.'s stock. No publicly held corporation owns 10 percent or more of Amway Corp.'s stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| RULE 29.6 CORPORATE DISCLOSURE STATEMENT | ii |
| INTRODUCTION | 1 |
| COUNTERSTATEMENT OF THE CASE | 3 |
| REASONS FOR DENYING THE PETITION | 9 |
| I. THE EIGHTH CIRCUIT CORRECTLY APPLIED THE WELL-SETTLED *MATSUSHITA* STANDARD | 10 |
| A. The Circuits Are Not In Conflict Over The *Matsushita* Standard | 10 |
| B. Petitioners Admitted In The District Court That They Have No Direct Evidence Of Conspiracy; Thus, Their Unpreserved Argument Seeks An Advisory Opinion On A Non-Existent Set Of Facts | 13 |
| C. Petitioners Did Not Offer Any Evidence Tending To Exclude The Possibility That Amway Acted Independently, As *Matsushita* Required Them To Do | 15 |
| II. THE EIGHTH CIRCUIT CORRECTLY RULED THAT AMWAY DOES NOT COMPETE AT THE SAME LEVEL OF THE MARKET AS InterNET AND PRO NET | 16 |

**TABLE OF CONTENTS – Continued**

Page

III. THE COURT OF APPEALS ALSO AFFIRMED ON GROUNDS PETITIONERS DO NOT CHALLENGE HERE, AND THUS THIS COURT'S DISPOSITION OF THE QUESTIONS PRESENTED WOULD NOT ALTER THE RESULT BELOW ..... 19

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

CASES — Page

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) ....10, 11

*Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028 (8th Cir. 2000) ....12

*Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006) ....12, 13

*Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004) ....12

*ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547 (8th Cir. 1991) ....17

*Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11 (1st Cir. 2004) ....12

*In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999) ....14

*Lovett v. Gen. Motors Corp.*, 998 F.2d 575 (8th Cir. 1993) ....12

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ....*passim*

*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) ....10

*Rogers v. United States*, 522 U.S. 252 (1998) ....14, 17

*Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998) ....13

*Scott v. Harris*, 550 U.S. 372 (2007) ....8

## TABLE OF AUTHORITIES – Continued

CASES Page

*United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) ..... 17

*Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001) ..... 12

*Youakim v. Miller*, 425 U.S. 231 (1976) ..... 15

No. 09-524

# In The Supreme Court of the United States

NITRO DISTRIBUTING, INC., et al.,

*Petitioners,*

v.

ALTICOR INC., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION

## INTRODUCTION

The case-specific holding of the Eighth Circuit is correct and does not warrant this Court's review. Petitioners attempt to create an inter-circuit conflict regarding the *Matsushita* standard, when none exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

The Eighth Circuit concluded that, regardless of whether petitioners' alleged evidence could be characterized as direct or circumstantial, there was no genuine issue requiring trial. It did not hold that petitioners had any direct evidence of Amway's

alleged participation in an antitrust conspiracy. Rightly so, for petitioners had none, nor did they argue to the district court that they had presented any. In fact, petitioners conceded while opposing summary judgment that their case was entirely circumstantial. Petitioners only recently switched gears at the Eighth Circuit, arguing for the first time that they had presented direct evidence and that *Matsushita* should not apply. Their belated arguments are unpreserved and meritless.

Petitioners' assertion that the Court of Appeals somehow created a *de minimis* market share exception to *per se* antitrust liability is similarly based on a distortion of the Eighth Circuit's opinion and unfounded assumptions regarding what their evidence was capable of showing.

Neither a circuit conflict, confusion, nor any question of constitutional significance is raised here. Petitioners' real quarrel is with the Eighth Circuit's view of the record. Petitioners fault the Court of Appeals for not accepting their unsupported characterizations of the evidence, even when such characterizations flew in the face of their other unambiguous admissions of record. Their disagreements with the Court of Appeals over the significance of the undisputed record evidence are case-specific and will have little, if any, impact on future cases.

Nor would review of the issues presented by petitioners change the outcome in this case. Other legal impediments and unchallenged deficiencies in

their proofs, (*see, e.g.*, Pet. 8),[1] would preclude a different outcome in the courts below. The petition should be denied.

## COUNTERSTATEMENT OF THE CASE

*Background*

1. Petitioners participated in the business support material ("BSM") market. BSMs include motivational materials or "tools," such as tapes and books, as well as "functions," such as live seminars. Petitioners produced BSMs related to the Amway business, which are intended to educate distributors of Amway products in best practices in selling and marketing.

2. Respondents (collectively, "Amway") manufacture a wide variety of personal and home care products that are sold through a vertically integrated network of distributors. (App. 69, 77-78.)

Amway products distributors sell, and sponsor others to sell, Amway products. When a distributor sponsors someone who, in turn, sponsors another, they are positioned vertically relative to each other in a "line of sponsorship" (or "LOS"). (App. 69, 77-78.)

[1] Page number references to the petition, "Pet. ___" refer to the pagination in the 8.5-by-11 inch, unredacted version under seal.

Amway products distributors agree to abide by Amway's Rules of Conduct. Amway does not require its distributors to use or to purchase BSMs. Amway's Rules of Conduct prohibit incorporated products distributors from selling anything other than authorized Amway products. If a distributor wishes to sell or distribute BSMs, he or she ordinarily will form a separate BSM corporation. (App. 69, 77-78.)

Petitioners are BSM corporations formed by principals of Amway products distributorships. These principals and their Amway products distributorships are not parties here. (App. 70, 72.)

Amway's Rules of Conduct also prohibit its products distributors from soliciting those whom they did not sponsor into the products business to purchase non-Amway products, including BSMs. (App. 15.)

2. Petitioners' claims against Amway arose out of a series of disagreements with their associates in the BSM business. Petitioners sued these associates in separate actions.

As early as 1996, several principals of BSM corporations, including Ken Stewart, owner of petitioners Nitro and West Palm, sought to break away from their existing BSM distribution network – InterNET – and form a new network – Pro Net. (App. 3-4.)

In the past, such splits had been acrimonious. Because all of these individuals also owned

separately incorporated Amway products distribution businesses, the acrimony tended to disrupt Amway's distribution network. (App. 4-5, 12.) For this reason, Amway had an obvious interest in ensuring that the InterNET-Pro Net dispute did not disrupt the Amway products distribution network.

*District Court Proceedings*

3. Amway filed four motions for summary judgment, asking the district court to dismiss all of petitioners' federal and state claims. Petitioners admitted repeatedly that they lacked direct evidence to support their claims against Amway, and that their case rested entirely upon circumstantial evidence. Petitioners' alleged evidence of Amway's involvement in the InterNET-Pro Net split is summarized accurately in the opinions of the Eighth Circuit and the district court. (*See* App. 4-7, 40-45.)

4. During summary judgment arguments, petitioners unequivocally stated that "'we don't have direct evidence exactly what they [Respondents] did but they [Respondents] were there, Judge.'" (App. 50.)[2]

---

[2] Petitioners inundated the district court with an over 800-paragraph "Master Statement of Facts," (App. 38), exclusive of their briefs. Petitioners' factual assertions frequently lacked any direct citation to the record evidence. Indeed, as the district court observed, the rambling submission "appears to reflect the difficulty even Plaintiffs have had in trying to set forth sufficient facts to support the conspiracy theory which is the heart of this case." (App. 38.)

Quoting extensively from petitioners' representations at oral argument, the district court granted Amway's motions for summary judgment.

The district court concluded that petitioners' circumstantial evidence did not tend to exclude the possibility that Amway acted independently, and failed to show any meeting of the minds between Amway and its alleged co-conspirators. (App. 48-53.) The district court specifically observed, "[t]his case is all about inference as there has been no direct evidence proffered to establish the existence of a conspiracy." (App. 50.) The district court also dismissed the antitrust claims of petitioners Netco, Inc. ("Netco") and Schmitz & Associates, Inc. ("Schmitz & Associates") as barred by the statute of limitations. (App. 65-66.)

*Eighth Circuit Proceedings*

5. Not until they got to the Eighth Circuit did petitioners argue that they had any direct evidence. And even then, petitioners relied primarily upon attorney argument that had absolutely no support in the record.[3]

---

[3] In asserting on appeal that the district court had misunderstood the nature of their conspiracy allegations and overlooked genuine factual disputes, petitioners frequently referred the Eighth Circuit to their briefs and Master Statement of Facts, rather than to any underlying evidence. (App. 17 at n.5.)

In a unanimous opinion, the Eighth Circuit affirmed the district court's dismissal of petitioners' antitrust claims for at least four reasons unique to this case:

First, petitioners' evidence did not tend to exclude independent action by Amway. (App. 9-12.)

Second, the undisputed evidence of record showed that because Amway did not compete at the same level of the market as InterNET and Pro Net, petitioners failed to raise a triable issue regarding any *per se* violation of the antitrust laws. (App. 12-14.)

Third, there was no evidence that the InterNET-Pro Net breakaway was unlawful. (App. 14-17.)

Fourth, the antitrust claims of petitioners Netco and Schmitz & Associates were time-barred. (App. 18-19.)

Petitioners only seek this Court's review of the Eighth Circuit's first two reasons for affirming the dismissal of their antitrust claims. Petitioners assume at the outset, contrary to the Eighth Circuit's express reasoning, that they had proven timely, *per se* violations of the antitrust laws.[4] (Pet. 4.) However,

---

[4] This unproven assumption has been the centerpiece of petitioners' case and drew criticism from both the district court and the Eighth Circuit. (App. 13 ("Once again, appellants' theories are cognizable only if a conspiracy is assumed."); App. 50 ("Plaintiffs are not allowed to make their case by first 'assuming a conspiracy and then explaining the evidence accordingly.' ").)

neither the district court nor the Court of Appeals held that the alleged agreement between InterNET and Pro Net constituted a *per se* illegal customer allocation agreement, nor have the petitioners proven as much.[5] The Eighth Circuit correctly recognized that the arrangement between InterNET and Pro Net could not be presumed to be *per se* illegal:

> The Court: You keep saying in the briefs, over and over, "it's per se, it's per se." It doesn't look that way to me.
>
> Mr. Boulware: Well, it's – it's – a –
>
> The Court: I mean it's a covenant not to compete of sorts. That's another, that's another way you can describe it. But covenants not to compete are not per se

---

[5] In this Court, petitioners fault Amway, as they did in the courts below, for failing to controvert each and every one of their 828 assertions in their "Master Statement of Facts." (Pet. 4 n.3). However, because petitioners' alleged evidence was legally insufficient to show a conspiracy either to allocate customers or to fix prices, let alone to show Amway's participation in either, Amway was not required to "controvert" petitioners' unsupported assertions.

Petitioners also take issue with several of the Eighth Circuit's recitations of the undisputed factual evidence. (Pet. 8 n.10.) In several of these instances, their arguments misstate the Eighth Circuit's opinion. The Eighth Circuit's rejection of petitioners' unsupported characterizations of the record did not amount to fact-finding. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (observing that the appellate court was not obligated to adopt the summary judgment non-movant's view of the facts, when that view was unsupported and "blatantly contradicted by the record. . . .").

> illegal in the, in the tort world, and they don't even crop up in the antitrust world except – here.

Eighth Circuit Oral Arg. 14:52-15:16.[6] Petitioners' price-fixing allegations were similarly unfounded. (App. 16.)

The Eighth Circuit correctly stated that the evidence of record failed to show that Amway joined any unlawful conspiracy. (App. 12-17.) The Court of Appeals properly rejected petitioners' unsupported characterizations of the evidence and the unreasonable inferences petitioners proposed. It affirmed the district court's dismissal of petitioners' antitrust claims on summary judgment.

Following the Eighth Circuit's ruling, petitioners moved for panel rehearing and rehearing en banc. The Eighth Circuit, viewing the arguments presented here as well as others, denied petitioners' request without comment.

## REASONS FOR DENYING THE PETITION

The Eighth Circuit's case-specific decision was correct and does not warrant this Court's review.

---

[6] References are to the minute:second of the Eighth Circuit oral argument as set forth in the publicly available audio file on the court's website under "Oral Arguments" at http://www.ca8.uscourts.gov.

Petitioners' claims of an inter- or intra-circuit conflict are illusory and rest upon issues not presented by this case. Moreover, resolution of the questions would not change the result because the Eighth Circuit affirmed for other reasons not addressed by the petition. This case is not a proper vehicle for deciding the questions presented, nor should it further consume this Court's scarce resources. The petition should be denied.

## I. THE EIGHTH CIRCUIT CORRECTLY APPLIED THE WELL-SETTLED *MATSUSHITA* STANDARD

### A. The Circuits Are Not In Conflict Over The *Matsushita* Standard

1. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) and in its predecessor case, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984), this Court definitively held that conspiracy cases brought under section 1 of the Sherman Act require evidence tending to exclude independent action. This Court announced no exception for direct evidence, although it noted an attempted offering of direct evidence of conspiracy in both cases. *Matsushita*, 475 U.S. at 582-83; *Monsanto,* 465 U.S. at 765. Nor did the Court announce any exception when discussing the *Matsushita* standard in *Bell Atlantic Corp. v. Twombly,* which addressed the pleading requirements for an antitrust case. *See* 550 U.S. 544, 554 (2007).

This Court's holdings are clear: an antitrust claimant must present evidence, either direct, circumstantial, or some combination of both, that tends to exclude the possibility that the antitrust defendants acted independently. *Matsushita*, 475 U.S. at 582-83.[7]

2. The Eighth Circuit correctly applied that standard to the record in this case. (App. 9, 10.)[8] The Court of Appeals ruled consistently with its precedent as well as with the precedent of its sister circuits.

Although the Eighth Circuit has stated that it applies the rule set forth in *Matsushita* broadly, without an exception for cases involving direct evidence, to date it has not encountered a case in which

---

[7] Justices Stevens and Ginsburg noted in *dicta* in their dissent in *Twombly* that the *Matsushita* framework only applied where antitrust claimants relied *entirely* on circumstantial evidence. *See* 550 U.S. at 585-86. That comment is neither the opinion of this Court nor binding precedent, and it also does not conflict with the result suggested by the Eighth Circuit's *dicta* in this case. The Eighth Circuit observed that "direct evidence of an unlawful conspiracy will likely preclude a lawful explanation," and thus likely raise a triable issue on an antitrust claim. (*See* App. 11.)

[8] Petitioners' suggestion, (Pet. 13), that the Eighth Circuit misapplied *Matsushita* by twice failing to recite the word "tending" exalts form over substance. Moreover, the Eighth Circuit also twice quoted the standard, including "tends," verbatim, (App. 9, 10), and it is clear that the Court of Appeals correctly required petitioners to come forward with evidence *tending* to exclude, rather than absolutely excluding, the possibility of independent action.

direct evidence actually was presented. *See, e.g., Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004) (requiring evidence tending to exclude the possibility of independent action and discussing no exceptions); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032 (8th Cir. 2000).

Appellants mistakenly argue that the Eighth Circuit provided an exception for direct evidence in *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1993). In *Lovett*, there was no direct evidence of conspiracy; thus, there was no occasion to decide whether, on the issue of requiring evidence tending to exclude independent action by the accused, there should be an exception when direct evidence is presented. *Id.*

Other circuits likewise have not recognized any exception for direct evidence. *See, e.g., Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 17-18 (1st Cir. 2004) (must show circumstantial or direct evidence tending to exclude possibility of independent action); *Virgin Atl. Airways Ltd. v. British Airways PLC,* 257 F.3d 256, 263 (2d Cir. 2001) (same). In all but one of the other decisions petitioners cite, (Pet. 9-10), no direct evidence was presented; thus, any statements suggesting an alleged exception for such evidence were *dicta*.

In the sole decision relied on by petitioners that even involved direct evidence, *Champagne Metals v. Ken-Mac Metals, Inc.,* (Pet. 10), the Tenth Circuit

expressly declined to decide whether there should be an exception for direct evidence because neither party presented that issue. *See* 458 F.3d 1073, 1085 (10th Cir. 2006). The most that can be gleaned from *Champagne Metals* is that the issue presented by the petition plainly is not ripe for review by this Court as no conflict exists in the courts of appeals. In all likelihood, any conflict will be a long time coming, should one ever arise. While often argued, truly direct evidence requiring no inferences is rare, as even the cases relied on by petitioners recognize. *See, e.g., Rossi v. Standard Roofing, Inc.,* 156 F.3d 452, 465 (3d Cir. 1998). Conversely, truly direct evidence would likely, but not necessarily, tend to exclude independent action in most cases, as the Eighth Circuit observed here. (App. 11.) In this particular case, however, the question is irrelevant because petitioners did not come forward with direct evidence in the first instance.

The Circuits are not in conflict over the application of the *Matsushita* standard.

### B. Petitioners Admitted In The District Court That They Have No Direct Evidence Of Conspiracy; Thus, Their Unpreserved Argument Seeks An Advisory Opinion On A Non-Existent Set Of Facts

This is not a direct evidence case. Petitioners repeatedly told the district court that they lacked

direct evidence of an antitrust conspiracy. They made no direct evidence argument, nor did they even argue against application of *Matsushita*, until they reached the Court of Appeals. *See Rogers v. United States,* 522 U.S. 252, 258-59 (1998) (dismissing certiorari as improvidently granted where legal question was not fairly or clearly presented in the case).

Moreover, petitioners acknowledge, (Pet. 7), that the Eighth Circuit did not hold that they presented direct evidence. As a result, the portion of the Eighth Circuit's opinion they attack is *dictum*. (App. 11.)

In this Court, petitioners retreat again and call their alleged direct evidence "at least strong circumstantial evidence." (Pet. 14.) However, petitioners' alleged evidence is neither direct nor strongly circumstantial.

Direct evidence in a section 1 conspiracy case must be explicit; inferences may not be used to establish the proposition or conclusion asserted. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). When stripped of petitioners' unwarranted assumptions that a *per se* illegal agreement to allocate customers or to fix prices had been shown, it is

clear that petitioners' alleged evidence[9] does not directly show or support an inference that Amway joined a conspiracy to violate the antitrust laws.

The first question presented by petitioners was not properly preserved, seeks nothing more than an advisory opinion, and is not worthy of this Court's time or review. *See Youakim v. Miller,* 425 U.S. 231, 234 (1976) (observing that this Court will not ordinarily decide questions not raised or resolved in the lower courts).

### C. Petitioners Did Not Offer Any Evidence Tending To Exclude The Possibility That Amway Acted Independently, As *Matsushita* Required Them To Do

1. Although petitioners accuse the Eighth Circuit of misunderstanding the nature of "independent action," (Pet. 13-15), the reality is that the court

---

[9] The evidence petitioners cite selectively at this late stage consists of a suggestion by Billy Zeoli, who was involved at the request of Pro Net principals, that Pro Net and InterNET refrain from soliciting one another's customers, as well as vague opinion testimony from two witnesses attempting to characterize Amway's alleged participation. (Pet. 14.) The suggestion by Zeoli "neither suggested nor precipitated unlawful activity attributable to Amway." (App. 14-15 and n.4.) At oral argument before the district court, petitioners conceded that Zeoli was an independent consultant. (App. 41.) Petitioners' ambiguous opinion testimony regarding Amway's alleged involvement does not tend to rule out that Amway was acting independently to protect its products business.

understood exactly what is required by that term and further understood that petitioners failed to offer any evidence tending to exclude the possibility that Amway acted independently, which they were required to do under *Matsushita*. *See* 475 U.S. at 588. This conclusion alone warranted affirmance.

2. The Eighth Circuit did not affirm merely because the evidence showed that Amway acted out of a desire to protect its products business. (*See* App. 12-13.) Rather, it affirmed because it recognized that Amway's purpose and actions were legally proper and insufficient to support an inference that Amway consciously committed to an illegal scheme with Pro Net and InterNET. *Id.*[10]

The Eighth Circuit correctly applied the well-settled *Matsushita* standard in this case.

## II. THE EIGHTH CIRCUIT CORRECTLY RULED THAT AMWAY DOES NOT COMPETE AT THE SAME LEVEL OF THE MARKET AS InterNET AND PRO NET

1. The undisputed evidence is that Amway is not at the same level of the market as InterNET and Pro Net. The Eighth Circuit correctly ruled that Amway acted not as a horizontal competitor, but as a

---

[10] Petitioners also fault the Eighth Circuit for not discussing their allegation that Amway sought to sell BSMs through Pro Net (Pet 3, 7), but petitioners offered no evidence to support their allegation.

vertical quasi-parent company. (App. 12-14.) Thus, Amway was incapable of combining with InterNET and Pro Net to impose a *per se* illegal restraint of trade. *See ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 556 (8th Cir. 1991) (observing that a section 1 violation "is a combination, conspiracy or agreement between competitors *at the same level of the market* to restrain competition; the so-called 'horizontal restraint of trade.'") (emphasis added). *See also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972) (same).

Petitioners conceded in the Court of Appeals that the Amway products business and the petitioners' BSM businesses are vertical:

> The Court: Is this one vertical product line with an ancillary support enterprise, industry if you will?
>
> Mr. Boulware: They are two side by side, and it is vertical, it is vertical.

Eighth Cir. Oral Arg. 1:58-2:15; *see also id.* at 17:53-19:03; *id.* at 3:45 (admitting that "Amway didn't have a market"); Dkt. No. 242, Ex. F to Petitioners' 1st Amend. Compl. (positioning Amway vertically above InterNet and Pro Net). Even petitioners' statement that Amway "has positioned itself as the gatekeeper of BSMs," (Pet. 18), is a concession that Amway's position was vertical, as a quasi-parent company, and supports the Court of Appeals' holding. *See Rogers*, 522 U.S. at 258-59.

2. The fact that Amway may have produced motivational materials for some limited use does not mean that Amway competes at the same level of the market as InterNET and Pro Net. Nor does the Antitrust Primer say that Amway competes at the same level of the market as InterNET and Pro Net, as petitioners suggest. (*See* Pet. 17 n.14.)[11]

3. As petitioners note, (Pet. 18), Amway has Rules about the types of representations that may be made about Amway's products business in motivational materials. Amway enforces these Rules among its products distributors, but this fact is inconsequential because petitioners are not products distributors. Indeed, in an earlier phase of this litigation, petitioners successfully argued that these Rules do not apply to them because they are *not* products distributors. (*See, e.g.*, App. 72.) They may not argue otherwise now.

---

[11] Petitioners' argument in footnote 15 is equally unavailing. (Pet. 17 n.15.) The undated document that petitioners appear to be referencing was not mentioned in their briefs or in their arguments to the Eighth Circuit. They did not provide the document to the Eighth Circuit at all, but instead merely offered their slanted mischaracterization of it in two sentences buried in their Master Statement of Facts that was a small part of seven volumes of appendix materials. Somehow, petitioners expected the Court of Appeals to locate, and then blindly accept, their unsubstantiated argument. Equally telling, however, is that even petitioners' characterization of the document to this Court, (Pet. 17 n.15), supports the Eighth Circuit's conclusion that Amway's relationship with BSM businesses, including InterNET and Pro Net, was vertical.

Moreover, Amway has a lawful right to impose vertical restrictions upon how its products distributors represent Amway in motivational materials. (*See* App. 15-16 (observing that the FTC "concluded that the line of sponsorship system [through which Amway's Rules are enforced upon products distributors] is vertically imposed and is 'reasonably ancillary to compensation, efficient distribution, and training.'").)

The Eighth Circuit correctly concluded, based on the undisputed evidence of record, that Amway does not compete at the same level of the market as InterNET and Pro Net. This case-specific conclusion did not create a *de minimis* exception to *per se* antitrust liability and does not require this Court's review.

## III. THE COURT OF APPEALS ALSO AFFIRMED ON GROUNDS PETITIONERS DO NOT CHALLENGE HERE, AND THUS THIS COURT'S DISPOSITION OF THE QUESTIONS PRESENTED WOULD NOT ALTER THE RESULT BELOW

The Eighth Circuit also affirmed for reasons having nothing to do with whether Amway was involved in any alleged conspiracy. The Court of Appeals determined that petitioners had not raised a triable issue regarding the existence of a *per se* illegal

agreement to allocate customers or to fix prices.[12] (App. 14 ("Although appellants have shown that Amway was involved in the breakaway, there is no evidence that the breakaway itself was unlawful.").) It also affirmed the district court's conclusion that the antitrust claims of Netco and Schmitz & Associates were time-barred. (App. 18-19.)

The petition does not address these independent bases for the affirmance by the Court of Appeals. This case is not an appropriate vehicle to resolve petitioners' issues because the Eighth Circuit's ruling will stand affirmed on these alternative grounds regardless of this Court's disposition of petitioners' questions presented.

---

[12] Petitioners incorrectly suggest that the Eighth Circuit held on its own initiative that they had not produced any evidence to support an inference of *per se* illegality for an alleged agreement between InterNET and Pro Net to refrain from soliciting each other's customers. (Pet. 8.) The Court of Appeals merely addressed an argument that Amway explicitly raised in its Response Brief at page 27. As Amway urged, any alleged agreement between InterNET and Pro Net would not have changed the status quo in the BSMs market because Pro Net and InterNET's principals were already obligated, as vertically integrated distributors of Amway products, to refrain from soliciting each other's customers. (App. 15-16.)

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES R. SOBIERAJ
*Counsel of Record*
CYNTHIA A. HOMAN
RALPH J. GABRIC
JULIE L. LEICHTMAN
BRINKS HOFER GILSON & LIONE
NBC Tower – Suite 3600
455 North Cityfront Plaza Drive
Chicago, Illinois 60611
(312) 321-4200

148

(2)

No. 09-524

Supreme Court, U.S.
FILED
DEC 11 2009
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

NITRO DISTRIBUTING, INC., *et al.*,

*Petitioners,*

v.

ALTICOR, INC., *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

R. DAN BOULWARE*
SHARON KENNEDY
POLSINELLI SHUGHART PC
3101 Frederick Avenue
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117

*Counsel of Record

*Attorneys for Petitioners*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| REASONS FOR GRANTING THE WRIT | 1 |
| I. REVIEW OF THE EIGHTH CIRCUIT'S INTERPRETATION OF *MATSUSHITA* IS NECESSARY TO BRING UNIFORMITY TO THE CIRCUITS | 1 |
| A. Question Presented No. 1 Presents A Pure Legal Question | 1 |
| B. A True Conflict In The Circuits Exists On The Proper Interpretation Of *Matsushita* | 2 |
| C. Direct Evidence Cases Occur With Enough Regularity That The Question Presented Should Be Finally Resolved | 3 |
| D. This Case Is The Appropriate Vehicle To Resolve The Important Question Presented | 4 |
| E. The Issue Presented In Question No. 1 Was Sufficiently Preserved For Appeal | 8 |
| F. Neither Of The Alternative Grounds For Decision Compel Denial Of Review | 9 |
| II. THE EIGHTH CIRCUIT'S CREATION OF A *DE MINIMIS* COMPETITION THRESHOLD FOR HORIZONTAL COMPETITOR STATUS IN *PER SE* CLAIMS WARRANTS REVIEW | 10 |
| CONCLUSION | 13 |

# TABLE OF AUTHORITIES

Page

CASES

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ..... 3

*Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006) ..... 3

*City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1999) ..... 4

*Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) ..... 12

*Hartford Fire Ins. Co. v. Clark*, 562 F.3d 943 (8th Cir. 2009) ..... 8

*Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc.*, 527 F. Supp.2d 1257 (D. Kan. 2007) ..... 4

*In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990) ..... 4

*Iqbal v. Ashcroft*, __ U.S. __, 129 S.Ct. 1937 (2009) ..... 7

*Kwoun v. Southeast Missouri Professional Standards Review Organization*, 811 F.2d 401 (8th Cir. 1987) ..... 6

*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) ..... 4

*Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984) ..... 6

TABLE OF AUTHORITIES – Continued

Page

*Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998) ..... 3

*Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008) ..... 4

*Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403 (5th Cir. 2007) ..... 4

*United States v. Therm-All, Inc.*, 373 F.3d 625 (5th Cir. 2004) ..... 4

*Yee v. City of Escondido, California*, 503 U.S. 519 (1992) ..... 10

## REASONS FOR GRANTING THE WRIT

Respondents' Brief in Opposition offers no valid reason to deny review of the important and purely legal question presented: whether the Eighth Circuit correctly construed *Matsushita* when it held that direct evidence of the defendant's participation in an antitrust conspiracy is not sufficient, in and of itself, to create a jury question on the existence of an antitrust conspiracy.

### I. REVIEW OF THE EIGHTH CIRCUIT'S INTERPRETATION OF *MATSUSHITA* IS NECESSARY TO BRING UNIFORMITY TO THE CIRCUITS

#### A. Petitioners' First Question Presents A Purely Legal Issue

Respondents' efforts to portray the Eighth Circuit's holding in this case as being "case-specific dictum" that will have no impact on future antitrust cases strain credulity. (Opp.Br. 1-2, 9, 14) Question No. 1 presents a pure question of law: whether the Eighth Circuit correctly construed *Matsushita* when it held that an antitrust plaintiff must satisfy the *Matsushita* standard even when the plaintiff has presented direct evidence that the defendant participated in an antitrust conspiracy. Because the Eighth Circuit's holding was based solely on its reading of *Matsushita,* that holding does not depend on any unique or specific facts. The court announced a black letter rule of law without regard to whether

the evidence Petitioners presented here was direct or circumstantial – a point driven home by the fact that the Eighth Circuit carefully avoided ruling on whether Petitioners' evidence was direct or circumstantial.[1] (*See* App. 11)

### B. A True Conflict In The Circuits Exists On The Proper Interpretation Of *Matsushita*

Respondents' claim that there is no inter-circuit conflict is unpersuasive, particularly since the Eighth Circuit itself expressly recognized that the Third and Eleventh Circuits interpret *Matsushita* differently. (App. 10) It is most telling that in a section supposedly devoted to showing that there is no conflict among the circuits, Respondents instead focus entirely on arguing that the Eighth Circuit's interpretation of *Matsushita* is the *correct* one. (*See* Opp.Br. at 10-13) Respondents do not even attempt to refute that the Third, Fourth, Fifth, Seventh, Ninth and Eleventh Circuits adopted an interpretation of *Matsushita* that directly contradicts the Eighth Circuit's.

Respondents' argument that Eighth Circuit's interpretation of *Matsushita* comports with the First and Second Circuit's interpretation has the opposite

---

[1] Had the Eighth Circuit believed Petitioners' evidence was entirely circumstantial as Respondents contend, it surely would have noted the lack of direct evidence.

of its intended effect. Rather than supporting the merits of the Eighth Circuit's decision, Respondents instead merely confirm the existence of a substantial split in the circuits.

A true conflict exists among the circuits as to the proper interpretation of *Matsushita* when direct evidence of an antitrust conspiracy is presented. The Eighth Circuit's new interpretation of *Matsushita*, which is at odds not only with a majority of circuits but with at least two Justices of this Court,[2] will undoubtedly vex future antitrust litigants and the courts until it is resolved.

### C. Direct Evidence Cases Occur Frequently Enough That The Question Presented Should Be Finally Resolved

Respondents also suggest that cases presenting direct evidence are rare. But courts are routinely presented with claims involving direct evidence of antitrust conspiracy. In addition to the Eighth Circuit here, and the previously discussed *Rossi*[3] and *Champagne Metals*[4] cases from the Third and Tenth Circuits, just a small sample of such cases include:

---

[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 585-86 (2007) (Stevens, J. and Ginsburg, J., dissenting).

[3] *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998).

[4] *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006).

*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765 (1984); *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 221 (3d Cir. 2008); *Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 410 (5th Cir. 2007); *United States v. Therm-All, Inc.*, 373 F.3d 625, 636 (5th Cir. 2004); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 460 n.22 (9th Cir. 1990); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 568 (11th Cir. 1999); *Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc.*, 527 F. Supp.2d 1257, 1301 (D. Kan. 2007). As is evident from this non-exhaustive list, direct evidence claims arise often enough to warrant resolution of this unsettled question.

### D. This Case Is The Appropriate Vehicle To Resolve The Important Question Presented

There can be no better vehicle nor more opportune time to clarify the summary judgment standard when direct evidence of an antitrust conspiracy is presented.

First, Petitioners here have in fact presented direct evidence of Amway's participation in an antitrust conspiracy such that the Eighth Circuit's ruling is not dictum. Respondents attempt to divert the Court's attention from the fact that *Nitro* is a direct evidence case by arguing that Petitioners conceded to the district court "that their case was entirely

circumstantial,"[5] and that Petitioners "repeatedly told the district court that they lacked direct evidence of an antitrust conspiracy."[6] That is not so. In reality, Petitioners told the district court that they had no direct evidence of Amway's involvement only as to one particular overt act – Petitioners' wrongful suspension from Pro Net – an event that occurred over a year *after* Amway had already joined the conspiracy with Pro Net by creating the customer allocation agreement. Tr.46 ("Now again, Amway, we don't have any evidence of Amway's specific and direct involvement in the suspension, the pretextual suspensions."); Tr.51 ("When [Pro Net] suspended these people, [Amway's executives] were present. As George said, we don't have direct evidence exactly what they did, but they were there, Judge."). Petitioners never conceded they lacked direct evidence of Amway's active participation in the creation of the illegal Pro Net/InterNet customer allocation agreement. In fact, at the district court level, Petitioners never assigned "direct" or "circumstantial" labels to any of their evidence. Indeed, they had no obligation to do so.

Notably, Respondents' discussion of three of Petitioners' most damaging pieces of direct evidence is relegated to a footnote. (*See* Opp.Br. at 15 n.9). There, Respondents attempt to dismiss the sworn testimony of two of Amway's co-conspirators as being "vague,"

---

[5] Opp.Br. at 2.

[6] Opp.Br. at 13-14.

and "opinion" testimony. (*See id.*) But a plain reading of the transcript shows otherwise.

In the same footnote, Respondents make another inaccurate representation, suggesting that Petitioners, by describing an individual as an "independent consultant," somehow conceded that he was not acting as Amway's agent when he engaged directly in conspiratorial conduct. But "independent consultant" and "agent" are not mutually exclusive terms. In fact, an independent (*i.e.*, non-employee) "consultant" *is* an agent for purposes of imputing liability to his principal. *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509, 518 (8th Cir. 1984); *Kwoun v. Southeast Missouri Professional Standards Review Organization,* 811 F.2d 401, 407 (8th Cir. 1987). The record reflects an abundance of compelling evidence that Amway's consultant was acting as its agent when he suggested, and then helped negotiate, the illegal customer allocation agreement.

*Nitro* is also a good vehicle for the Court to address the *Matsushita* standard because the facts on which Petitioners rely to show a conspiracy were largely uncontroverted by Respondents. Respondents argue that they were not required to controvert Petitioners' facts because they either were unsupported or failed to demonstrate a conspiracy. The first basis is wrong and the second is circular. The record reflects that every fact proffered by Petitioners was supported by affidavit, deposition testimony or other competent summary judgment evidence, and the trial court was given boxes of affidavits, deposition transcripts and

exhibits to support each fact. Those uncontroverted facts, if accepted as true as they were required to be, amply demonstrated a jury question on Amway's participation in an antitrust conspiracy.

*Nitro* also gives the Court an opportunity to forestall any confusion over the meaning of "independent action" as used in the *Matsushita* test. The Eighth Circuit's opinion can easily be read as holding that a defendant acts "independently" as long as its collusive activity is motivated by a desire to protect its own business. As Petitioners suggested in their Petition for Writ of Certiorari, however, this interpretation of *Matsushita* would eviscerate the antitrust laws because *every* defendant is motivated by a desire to protect its business. (*See* Pet. 16)

Last term, the Court examined a district court's authority to review the plausibility of a plaintiff's pleadings on a motion to dismiss. *See Iqbal v. Ashcroft*, __ U.S. __, 129 S.Ct. 1937 (2009). *Nitro* represents a next logical step: the contours of a court's authority to determine the plausibility of a plaintiff's antitrust conspiracy claims on summary judgment. For all these reasons, both the timing and the factual context of the case make *Nitro* the best vehicle for review of the important questions presented.

### E. The Issue Presented In Question No. 1 Was Sufficiently Preserved For Appeal

Respondents also argue that review is inappropriate because Petitioners did not preserve the issue presented in Question No. 1 because "[t]hey made no direct evidence argument, nor did they even argue against application of *Matsushita*, until they reached the Court of Appeals." (Opp.Br., at 14). Once again, Respondents are wrong. An issue is preserved for appeal if it is a "narrow subset of 'a party's more general argument [when] no new evidence is presented on appeal.'" *Hartford Fire Ins. Co. v. Clark*, 562 F.3d 943, 946 (8th Cir. 2009).

Here, the issue of whether there was sufficient evidence to create a jury question on whether Amway joined an antitrust conspiracy was a central, heavily debated issue in the district court proceedings below. The *Matsushita* standard – which tests whether it is reasonable to infer the existence of an antitrust conspiracy from circumstantial evidence – is a narrow subset of Petitioners' general argument that their evidence was sufficient to avoid summary judgment. Petitioners were not required to expressly label their evidence as "direct" or "circumstantial" in order to preserve their argument that the courts below applied the wrong legal standard in rejecting their antitrust claims. Nor could Petitioners have possibly anticipated the Eighth Circuit's ground-breaking interpretation of *Matsushita*, which created a question worthy of this Court's review. The narrow question presented here did not even arise until the Eighth

Circuit broke rank with its sister circuits by adopting a contrary interpretation of *Matsushita*. For these reasons, and because Petitioners presented no new evidence on appeal that was not contained in the record presented to the district court, the issue presented in Question No. 1 was sufficiently preserved for review.

### F. Neither Of The Alternative Grounds For Decision Compel Denial Of Review

Respondents' final argument is that review should be denied because the Eighth Circuit affirmed the trial court's entry of summary judgment on two independent grounds on which Petitioners do not seek review: (1) that the customer-allocation and price-fixing agreement was not illegal; and (2) that Netco and Schmitz Associates' antitrust claims are time barred.

As stated in Petitioners' Petition, the Eighth Circuit reached its ruling that the customer allocation agreement was not illegal by ignoring Petitioners' uncontroverted evidence. (*See* Pet. 10 n.10) Petitioners did not separately seek review on this issue because they recognized that such case-specific legal error does not create a certworthy question. However, if review is granted on the question presented, it would include this issue as a "subsidiary question fairly included" in the question of whether the summary judgment standard was misapplied to

Petitioners' antitrust claims *See Yee v. City of Escondido, California,* 503 U.S. 519, 535 (1992).

With respect to the time-barred antitrust claims of Netco and Schmitz Associates, Petitioners do not seek reversal of that decision. However, the court predicated dismissal of Petitioners' tortious interference claims on the failure of their antitrust claims. If summary judgment is reversed as to the antitrust claims, the tortious interference claims of all Petitioners, including those Netco and Schmitz & Associates (which are not time-barred), should also be reinstated.

## II. THE EIGHTH CIRCUIT'S CREATION OF A *DE MINIMIS* COMPETITION THRESHOLD FOR HORIZONTAL COMPETITOR STATUS IN *PER SE* CLAIMS WARRANTS REVIEW

Respondents' opposition to this Court's review of Question No. 2 is similarly unpersuasive. They first argue that Petitioners conceded that Amway was not a horizontal competitor (*see* Opp.Br. at 17), and then in the very next breath themselves concede that Amway *does* compete horizontally. (*See* Opp.Br. at 18, admitting that Amway "may have produced motivational materials" but arguing that Amway's share of the BSMs market is not the same "level" as Pro Net's or InterNET's.) In truth, Petitioners never wavered from their position that Amway is a horizontal competitor in the separate BSMs business. The supposed "concession" quoted by Respondents is not to the

contrary. Petitioners' Counsel merely acknowledged that the Amway product business and the separate BSMs industry are each vertical distribution systems. (Opp. Br. at 17) But while Amway sold Amway products vertically through its product distribution system, it also competed *horizontally* with its alleged co-conspirators, Pro Net and InterNET, by producing and selling its own BSMs in competition with them, as Respondents expressly admitted in the record below. (*See, e.g.*, Pet. 21 n.14)

In their Opposition, Respondents make the same mistake as the Eighth Circuit in construing competition "at the same level of the market" as referring to the *quantum* of a defendant's market share rather than its *position* in the distribution chain (*e.g.*, manufacturer, wholesaler, or retailer). Amway undeniably competes "at the same level" as Pro Net and InterNET, because all of them are producers and sellers of BSMs. There is no recognized exemption from liability in a *per se* horizontal customer allocation or price fixing claim simply because one competitor's percentage share of the market is smaller than that of its alleged co-conspirators.[7] *See,*

---

[7] In their Petition for Writ of Certiorari, Petitioners cited a particular document the Eighth Circuit overlooked in finding that Amway's market share was *de minimis*. (Pet. 17. n.15) Respondents counter that the document was "buried" in an "unsubstantiated argument" in Petitioners' Master Statement of Facts. In fact, this particular piece of evidence was separately described in Petitioners Statement of Fact No. 57, and the exhibit itself was provided to the trial court to support the fact

(Continued on following page)

*e.g., Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 434-35 (1990) (recognizing that even a small competitor may cause antitrust injury).

Respondents attempt to confuse the issue by arguing that Amway has the lawful right to impose vertical restrictions on its Amway distributors. While that may be true, Petitioners, Pro Net and InterNET are not Amway distributors. They are legally separate corporations that engage in the BSMs business.[8] Amway's rules have no application to entities that are not Amway distributors, as Respondents themselves now concede is the law of the case. (*See* Opp.Br. at 18) Accordingly, when Amway, an admitted competitor in the production and sale of BSMs, actively helped its horizontal competitors, Pro Net and InterNET, make an agreement to allocate customers and fix prices, it violated the antitrust laws.

---

asserted, as the summary judgment rules provide. Because Amway did not controvert that fact or any others, the Eighth Circuit was required to accept those properly supported fact(s) as true, and it was unnecessary for Petitioners to provide the Eighth Circuit with their several bankers boxes of supporting exhibits, transcripts and other documentation. If the Eighth Circuit nevertheless wished to examine any evidentiary support, it could have ordered the exhibits to be transmitted from the district court.

[8] Only Petitioner Netco operated both an Amway distributorship and a BSMs distributorship under the same corporate entity.

Respondents have asserted no valid basis for denying review of the issue presented in Question No. 2. Review of the Eighth Circuit's holding is necessary to return uniformity to the circuits on the principle that there is no minimum threshold of market share in *per se* claims of horizontal customer allocation and price fixing.

## CONCLUSION

For these reasons, Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

R. DAN BOULWARE
SHARON KENNEDY
POLSINELLI SHUGHART PC
3101 Frederick Avenue
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117
Facsimile: (816) 279-3977

*Attorneys for Petitioners*